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Supreme Court of The United States

October Term, 1999

GRUPPO AGUSTA, AGUSTA AEROSPACE CORPORATION, CONSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA, S.p.A. and AGUSTA S.p.A.,

Petitioners,

v.

PARAMOUNT AVIATION CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether New Jersey's entire controversy doctrine is applicable to actions pending in a federal forum venued in New Jersey so as to bar claims against those claims which could and should have been joined in a previous suit, regardless of whether the earlier suit was brought in a foreign state or federal court.

II. Whether New Jersey's entire controversy doctrine is a substantive rule as its application in any matter would lead to an outcome determinative result.

III. Whether the rules of fairness and the doctrines of judicial interest demand the application of New Jersey's entire controversy rule in a removal case based solely on diversity of citizenship when a party that had multiple opportunities to raise its claims involving a ten (10) year old incident which was the subject of five prior actions, three of which it was a direct party and one of which it was a third party defendant, should be barred from further prosecution.

CORPORATE DISCLOSURE STATEMENT

Gruppo Agusta, Costruzioni Aeronautiche Giovanni Agusta, S.p.A. ("CAGA"), and Agusta S.p.A. are foreign entities which were created pursuant to the laws of the Republic of Italy. The parent corporations and those entities owning 10% or more are: Finmeccanica S.p.A. and Istituto per la Ricostruzione Industriale, neither of which are publicly held corporations.

Agusta Aerospace Corporation ("AAC") is a subsidiary of Finmeccanica S.p.A. and is not a publicly held corporation.

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OPINIONS ENTERED IN THIS CASE

The order and opinion of the Court of Appeals for the Third Circuit is officially reported as: *Paramount Aviation Corporation v. Gruppo Agusta; Agusta Aerospace Corporation; Costruzioni Aeronautiche Giovanni Agusta S.p.A.; Agusta S.p.A.*, 178 F.3d 132 (3d Cir. 1999). (Appendix or App. 40a - 67a)

The order and opinion of the District Court for the State of New Jersey is unreported. The unofficial cite to the District Court's opinion is: *Paramount Aviation Corporation v. Gruppo Agusta; Agusta Aerospace Corporation; Costruzioni Aeronautiche Giovanni Agusta S.p.A.; and Agusta S.p.A.*, No. 91-4954 (D.N.J. July 22, 1999). (App. 22a - 38a).

JURISDICTION

The Court of Appeals entered its judgment on May 13, 1999 (App. 68a - 69a). No petition for rehearing was timely filed in this case. A certified judgment in lieu of a formal mandate was issued on June 4, 1999. (App. 68a - 69a).

The jurisdiction of this Honorable Court is accordingly involved under 28 USC § 2101 (c).

STATUTE INVOLVED IN THIS MATTER

This focus of this matter turns on the interpretation and application of New Jersey's entire controversy doctrine, codified in Rule 4:30A of the New Jersey Rules of Court.

The statute provides,

> *Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R.4:64-5 (foreclosure actions) and R.4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).*

STATEMENT OF THE CASE

I. Statement of Facts

Paramount's claims arise from a helicopter accident, which occurred nearly ten (10) years ago. (App. 3a) On October 10, 1989, an Agusta 109A helicopter crashed in Lacey Township, New Jersey, fatally injuring four people: the pilot, Larry Diener, the co-pilot, Robert S. Kent, and three passengers. The passengers were employed at the time of the accident by Trump Taj Mahal Associates, Trump Castle Associates, and/or Trump Plaza Associates.

The aircraft, serial number 7309, was manufactured by CAGA in 1984 and later purchased by AAC. (App. 3a) In December of 1985, AAC sold the aircraft to Soundview Leasing, which later sold it to Clifton Park Association.

In June of 1989, Clifton Park Association sold the helicopter to FSQ Air Charter Corporation (hereinafter referred to as "FSQ"). FSQ leased the aircraft to Paramount, which was operating the aircraft at the time of the accident under the Paramount certificate of authority.

Paramount arranged and performed management and maintenance of the subject helicopter under Part 135 of the Federal Aviation Regulations and was responsible for the inspections, maintenance, overhaul and scheduling of the subject helicopter and its components. Thereafter, Paramount arranged for the sale of the helicopter to FSQ and contracted with FSQ to manage the aircraft and supply one of the two pilots to operate it.

As a result of the accident, other lawsuits were commenced in different jurisdictions. Notably, Paramount was a party to four of the five legal proceedings. The following is a summary of the prior actions:

i. The Kent Lawsuit

On March 30, 1990, Susan Kent, individually, as the wife of co-pilot Robert S. Kent, and on behalf of the decedent's two minor children, filed a Summons and Complaint in the United States District Court, Eastern District of Pennsylvania, against AAC, CAGA and Agusta S.p.A. and Paramount. (App. 4a) The Agusta Defendants served their Answers and asserted cross-claims against Paramount for contribution and indemnification. Paramount's Answer included cross-claims against the Agusta Defendants for contribution and indemnification, but did not include any affirmative claims for relief. The action was settled on November 27, 1990 with Agusta and Paramount contributing to the settlement.

The Kents' attorney, Richard E. Genter, Esq., of Wolk, Genter & Harrington[1], sent a letter to the presiding Judge, the Hon. Joseph S. Lord, III dated November 26, 1990 that contained the following language:

> Confirming our telephone conversation this morning, and my subsequent conversation with George Wylesol [then Deputy Clerk for Judge Lord], I am writing to clear up two questions you had with regard to the petition for settlement approval in the above captioned case.
>
> Specifically, upon issuance of an appropriate order from the Court, the entire case as to all defendants [the Agusta

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[1] The Kent Plaintiffs were represented by the firm of Wolk, Genter & Harrington, who now represent Paramount in the instant action.

> Defendants and then-defendant, plaintiff [Paramount]] will be settled...

(J.A. 275).

ii. The Trump Lawsuit

On July 10, 1990, Trump Taj Mahal Associates, Trump Castle Associates, Trump Plaza Associates (the employers of the three passengers that were killed in the subject accident), and Helicopter Air Services, Inc. (the owner of another Agusta 109 Mak II helicopter similar to the helicopter involved in the subject accident) instituted an action in the Superior Court of New Jersey, Atlantic County Division, against the Agusta Defendants and Paramount for damages resulting from the subject accident.[2] (App. 43a) This action was thereafter removed to the United States District Court, District of New Jersey. On April 11, 1991, prior to service of answers by any of the Agusta Defendants, then Chief Judge, the Hon. John F. Gerry, granted the Agusta Defendants' motions to dismiss all claims brought by the Trump-entity plaintiffs. The Court also dismissed the claims of Helicopter Air Services, Inc., as frivolous. This Court affirmed the trial court's decision. The United States Supreme Court denied certiorari on October 5, 1992.

iii. The FSQ Lawsuit

On April 11, 1991, FSQ Air Charter Corp., the owner of the subject helicopter, filed a Summons and Complaint in the United States District Court, Eastern District of New York, against the Agusta Defendants for damages to its aircraft resulting from the subject accident. (App. 43a) AAC

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[2] As in the Kent lawsuit, the Trump plaintiffs were represented by the firm of Wolk, Genter & Harrington, the firm now representing Paramount.

served a Third-Party Complaint against Paramount for contribution and indemnification. Paramount's Third-Party Answer did not contain any affirmative defenses or any affirmative counterclaims for damages against the Agusta defendants.

When Paramount served its Third-Party Answer in the FSQ lawsuit, the Kent lawsuit against Agusta and Paramount had been settled, and the Trump plaintiffs were in the process of appealing Agusta and Paramount's motion for summary judgment. On June 19, 1992, the FSQ lawsuit was settled and a mutual release was executed by Agusta and United States Aviation Underwriters, Inc., the insurance carrier for both FSQ and Paramount. The release settled the property damage claim occasioned by the destruction of the subject helicopter. The Mutual Release provides in part:

> This Release does not extend to any claim made or related to the lawsuit encaptioned Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., No. 91-5295, currently pending before the United States Court of Appeals for the Third Circuit, and the lawsuit encaptioned Paramount Aviation Corporation Corp. v. Gruppo Agusta, et al., Civil Action No. 91-4954 (JWB), currently pending before the United States District Court for the District of New Jersey...

iv. PAC I

On July 11, 1990, Paramount[3] filed a Summons and Complaint in the United States District Court, District of New Jersey, against Agusta seeking damages for economic

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[3] In the PAC I lawsuit, Paramount was represented by the firm of Shain, Schaffer & Refanello, P.C.

losses resulting from the subject accident. (App. 43a) The PAC I lawsuit sought: Compensatory damages; Consequential damages; Loss of income; Loss of goodwill in the industry; Interest; Costs; Attorneys fees; Such other damages as are deemed just and provided for by applicable law; and Punitive damages for Defendants' outrageous, willful, wanton, malicious and reckless conduct meriting civil punishment.

Five weeks later, however, Paramount voluntarily discontinued its action against Agusta. When PAC I was discontinued, Kent was active in the Eastern District of Pennsylvania and the Trump lawsuit had just been filed. Paramount and Agusta were defendants in both actions.

v. PAC II (The Pending Litigation)

On October 10, 1991, Paramount[4] filed a Summons and Complaint in the Superior Court of New Jersey, Morris County, against Agusta again seeking damages for economic losses resulting from the subject accident. The causes of action and damages plead in PAC II are substantially the same as those alleged in PAC I. (App. 44a)

The damages sought allegedly resulted from the subject accident. On November 12, 1991, AAC removed the action to the United States District Court, District of New Jersey, and filed its Answer and Counterclaim.

At the time of this action: the Kent lawsuit, which named both Agusta and Paramount as defendants, had been

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[4] At the time the lawsuit was filed, Paramount was represented by the firm of Shanley & Fisher, P.C. Paramount later retained the services of their current counsel, Wolk, Genter & Harrington, which had represented the plaintiffs in the Kent and Trump actions against Paramount.

settled for almost one year; the trial court in the Trump case, which named both Agusta and Paramount as defendants, had granted the defendants' motions dismissing the Trump plaintiffs' lawsuit; and, Paramount had served its Third-Party Answer in the FSQ lawsuit without pleading any affirmative claim for damages.

II. Importance Of The Entire Controversy Doctrine

The entire controversy doctrine seeks to assure that all aspects of a legal dispute occur in a single lawsuit. Olds v. Donnelly, 150 N.J. 424, 430, 696 A.2d 633, 636 (1997); Prevratil v. Mohr, 145 N.J. 180, 678 A.2d 243 (1996). In applying the entire controversy doctrine, the central consideration is whether the claims arise from related facts of the same transaction or series of transactions. Mori v. Hartz Mountain Dev. Corp., 193 N.J. Super. 47, 472 A.2d 150 (App. Div. 1983) (holding that action for rent should have been joined with an earlier partition action because both claims related to the same property and to the parties' rights); Boardwalk Regency Corp. v. Square Brighton Corp., 288 N.J. Super. 494, 672 A.2d 1185 (App. Div. 1996) (applying doctrine to bar a subsequent claim because both actions related to the parties' interests in the same property).

The doctrine serves several purposes: "[T]he needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of `piecemeal decisions.'" Cogdell v. Hospital Ctr. at Orange, 116 N.J. 7, 15 (1989) (citation omitted); see also Petrocelli, 993 F.2d 27, 28-29 (quoting Cogdell); Kozyra, 973 F.2d 1110, 1111 (quoting Cogdell). The doctrine is equitable in nature and is predicated upon judicial fairness. Kozyra v. Allen, 973 F.2d 1110-1111; Cafferata v. Peyser, 251 N.J. Super. 256 (Super. Ct. App. Div. 1991). In the interest of

fairness, courts have carved out several exceptions to the preclusive effect of the doctrine.

Since the doctrine was incorporated into the New Jersey constitution, the doctrine has evolved to become "a mandatory rule for the joinder of virtually all causes, claims, and defenses..." Cogdell, 116 N.J. at 16; see, e.g., Steiner v. Stein, 2 N.J. 367 (1949) (requiring joinder of legal claims even when equitable claims have been decided); Massari v. Einsiedler, 6 N.J. 303 (1951) (requiring joinder of all defenses).

III. Jurisdiction: U.S. Court of Appeals, Third Circuit

The United States Court of Appeals, Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 to review the judgment and final orders entered by the United States District Court for the District of New Jersey.

IV. Jurisdiction: New Jersey District Court

The District Court maintained removal jurisdiction pursuant to 28 U.S.C. § 1441 (a) and thereafter, original jurisdiction over the underlying action pursuant to 28 U.S.C. § 1332 based upon the diversity of citizenship of the parties.

ARGUMENTS FOR ALLOWING WRIT

I. The Third Circuit Court Erred In Holding That The Entire Controversy Doctrine Does Not Apply To Cases Pending In New Jersey Federal Fora When The Prior Suit Was Litigated In A Foreign State Or Federal Court.

"...[T]he contours of the entire controversy doctrine 'are not fixed precisely by this decision. Its contents and bounds can evolve with experience...either through formal rulemaking or case-by-case adjudications." Itzkoff v. F&G Realty of New Jersey, Corp., 890 F.Supp. 351 (D.N.J. 1995) (citing Cogdell v. Hospital Center at Orange, 116 N.J. 7, 28, 560 A.2d 1169 (1989)). In this action, the U.S. District Court for the State of New Jersey used its discretionary powers to make certain factual and legal determinations. The Third Circuit's opinion is clearly inimical to the District Court's findings and contrary to its discretionary mandate.

In sum, the Third Circuit has rendered a per se rule that is inconsistent with previous state court opinions and contrary to established federal law. A per se ban against the application of the doctrine any time the prior action was adjudicated in an out-of-state court ignores the doctrine's appeal to fairness and basic underlying foundation.

Out of the five previously commenced actions, three actions were venued in New Jersey. In Trump, the action was originally commenced in New Jersey state court and then removed to New Jersey federal court. In PAC I, the Respondent, filed its action in a New Jersey federal court. PAC II was also commenced by Respondent in New Jersey state court, but was later removed to a New Jersey federal court. The Third Circuit failed to consider or refer to the prior actions which were indisputably venued in New Jersey.

In essence, the Third Circuit's opinion is that it indirectly overrules prior District Court and State Court decisions holding that prior legal actions need not have been held in a New Jersey state court. In Garruto v. Cunningham, 1994 WL 723034 (D.N.J. Dec. 27, 1994), the District Court for the State of New Jersey found that the entire controversy doctrine barred plaintiff's claim. Both parties in Garruto litigated in the Court of Common Pleas, Union County, Ohio. After the Ohio action concluded, Garruto then initiated a subsequent action in the U.S. District Court for the State of New Jersey. Id. The Garruto opinion is void of any language holding that the doctrine is inapplicable to matters previously litigated in foreign jurisdictions. See, e.g., Airwork Corp. v. Energy Maintenance Corp., 1993 WL 534329 (D.N.J. Dec. 22, 1993) (barring plaintiff's suit by the entire controversy doctrine when prior action was commenced in the U.S. District Court for the Southern District of New York); Miller v. Scari, 289 N.J.Super. 482, 674 A.2d 210 (Super. Ct. Law Div. 1996) (barring action under entire controversy doctrine although prior action was litigated in the U.S. District Court for the District of New Jersey); Gross v. Cohen Dufour & Assoc., 273 N.J.Super. 617, 642 A.2d 1074 (Super. Ct. Law. Div. 1993) (holding doctrine applicable when prior action was litigated in the U.S. District Court for the District of New Jersey); Guidice v. Drew Chem. Corp., 210 N.J.Super. 32, 509 A.2d 200 (Super. Ct. App. Div. 1986), *cert. granted and summarily remanded on other grounds*, 104 N.J. 465, 517 A.2d 448 (1986) (precluding, under entire controversy doctrine, claims that could have been brought in related New York proceedings).

As evident by its opinion, the Third Circuit claims to have found support in Mortgageling Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 662 A.2d 536 (1995) by placing significant reliance on the holding. The clear language and the obvious holding of Mortgageling

unquestionably supports, both factually and legally, Petitioner's position.

The entire controversy doctrine controlled the court's result in Mortgagelinq. Similar to this matter, Mortgagelinq involved a prior proceeding which was litigated in a foreign federal court - the U.S. District Court for the Eastern District of Pennsylvania. Subsequent to the Pennsylvania action, a second case was brought in New Jersey state court. As in this case, the issues, facts, causes of action and transactions in both cases were virtually identical. See Id. at 336, 662 A.2d. 536 Even more instructive to this Petition is that the District Court certified two questions precisely responsive to this case:

> (1) This issue is whether the non-joinder of parties in a related action in the Pennsylvania federal court results in the same party preclusion in New Jersey.
>
> (2) If so, what is the effect of that preclusion in other jurisdiction?

The question was answered in the affirmative. The court in Mortgagelinq held that the plaintiffs were precluded from suing in New Jersey the defendants who had been omitted from the federal case in Pennsylvania. The court also held that this result was binding only in New Jersey, leaving other jurisdictions free to permit litigation against the omitted defendants in their courts. Stephen B. Burbank, Where's The Beef? The Interjurisdictional Effects Of New Jersey's Entire Controversy Doctrine, 28 Rutgers L.J. 87, 88 (1996).

The holding in Mortgagelinq as announced by the New Jersey Supreme Court is clear and unequivocal and

should not be undermined by the self-serving interpretation of another sovereign:

> the entire controversy doctrine operates to bar suits against parties which could and should have been joined in a previous suit despite the fact that the earlier suit was brought in another state or federal court.

Id.

In a situation where a party that deliberately chooses to fragment litigation by suing certain parties in another jurisdiction and withholds claims against other parties, a New Jersey court need not later entertain the claims against the omitted parties if jurisdiction was available in the first forum. See Mortgageling. In the instant opinion, the Third Circuit virtually echoed this same holding. The Third Circuit held:

> ...the entire controversy doctrine would only bar a subsequent New Jersey suit if the first forum would have had jurisdiction over the claims raised in that subsequent suit. It therefore follows that there was an alternate non-New Jersey forum for the relevant claims, although in some cases that forum would be another state court.

(App. 56a).

Paramount's fragmentation of its claims is the precise conduct that the entire controversy doctrine seeks to eliminate.

II. The Third Circuit Erred In Finding That The Entire Controversy Doctrine Is A Procedural Rule.

The bedrock canons pronounced in Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), were rooted in part in a realization that it would be unfair for the character of the result of a litigation to materially differ because the suit had been brought in a federal court. Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136 (1965). Erie held that federal courts sitting in diversity cases, when deciding questions of substantive law, are bound by state court decisions as well as state statutes. Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990) (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)). The fact that this action was removed to federal court based on diversity is not reason to deprive the parties of the application of a substantive state-enacted rule.

Third Circuit's decision to qualify the entire controversy doctrine as "procedural" is in direct conflict with prior decisions. In fact, the Third Circuit expressed its unsettled holding by stating that,

> [W]hile a decision to apply federal preclusion law would be outcome determinative in this case, therefore, it would not ex ante cut off or extend any substantive rights that a plaintiff would have in the absence of a New Jersey federal forum, and would be unlikely to encourage significant forum-shopping.... The issues of outcome-determinativeness and a consequent incentive to forum-shop are not free from doubt, however.

(App. 57a).

The entire controversy doctrine has been routinely applied in the courts of this jurisdiction. See, e.g., Petrocelli

v. Daniel Woodhead Co., 993 F.2d 27 (3d Cir. 1993); Kozyra v. Allen, 973 F.2d 1110 (3d Cir. 1992); Rycoline Products, Inc. v. C&W Unlimited, 109 F.3d 883, (3d Cir. 1997). In deciding issues of preclusion, other circuit courts have applied state substantive laws specifically in federal diversity cases. See, e.g., Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied,* 480 U.S. 948 (1987) (holding that federal courts routinely apply state law to determine the preclusive effect of a federal diversity judgment in a subsequent diversity action); Bates v. Union Oil Co. of California, 944 F.2d 647 (9th Cir. 1991), *cert. denied,* 503 U.S. 1005 (1992) (holding that in a subsequent diversity action, forum state's law applies to determine preclusive effect of previous judgment);

The entire controversy doctrine is a creature of New Jersey common law and, therefore, is applicable in a federal forum. Erie, 304 U.S. 64, 64. It was decided in Erie that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. Cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be -- in the absence of other considerations -- to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. See, e.g., Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, (1945); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 76 S.Ct. 273 (1956).

Erie suggests that federal judgments on state-law issues should have the same impact they would have if rendered by New Jersey courts. Fioriglio v. City of Atlantic City, 963 F.Supp. 415, 421 (D.N.J. 1997). In Fioriglio, the plaintiff's claim was not barred by the entire controversy doctrine since the previous matter involved claims brought

under federal statute. Id. In deciding whether the doctrine should be applied in federal court, the Fioriglio court engaged in a resonant discussion invoking the Erie three-prong inquiry. In applying Erie, the court found that "an overriding federal interest justifies the application of federal law." Fioriglio, 963 F.Supp. at 422.

The Fioriglio court also based their decision on the simple fact that the claim was based on federal question jurisdiction. Id. at 415, 423. The instant matter, however, does not involve federal question jurisdiction. Rather, the instant matter involves tort claims specific to New Jersey law and its interpretation. New Jersey's preclusion rule should apply in the instant matter since this is an action pending in federal court arising out of the law of New Jersey. Velasquez v. Franz, 123 N.J. 498, 589 A.2d 143 (1991).

The line between substance and procedure shifts as the legal context changes. Guaranty Trust at 108, 65 S.Ct. 1464, 1469. Each implies different variables depending upon the particular problem for which it is used. Id. The Third Circuit failed to treat the entire controversy doctrine comparable to its legal context.

The doctrine should operate to bar suits against parties which could and should have been joined in a previous suit, despite the fact that the earlier suit was brought in another state or in federal court. Itzkoff, 890 F.Supp. 351, 359. See, e.g., Gross ("the entire controversy doctrine bars a state court suit against parties which could have and should have been joined in a previous federal action").

The Federal Rules of Civil Procedure are not statutes, and mischief can follow from the assumption that they are. Stephen B. Burbank, The Rule Enabling Act of 1934, 130 U.Pa.L.Rev. 1015, 1102 (1982). This Court in Johnson v. Fankell, 520 U.S. 911, 117 S.Ct. 1800 (1997) cautioned

against the exact extraneous interpretation that has been given the entire controversy doctrine by the Third Circuit. This Court stated:

> [E]ven if the Idaho and federal statutes contained identical language -- and they do not -- the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts. Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.

Id. at 520 U.S. 911, 916, 117 S.Ct. 1800, 1803.

Unlike preclusion law, the entire controversy doctrine applies to prior settlements whether or not they were reduced to judgment. Ditrolio v. Antiles, 142 N.J. 253, 278, 662 A.2d 494, 507 (1995). New Jersey has introduced this powerful administrative weapon to confront scenarios as the one at hand. By initially dismissing this matter, the District Court simply applied its own notion of adjudicative integrity to close its courts to a particular frivolous lawsuit.

The Third Circuit concedes that "the substance/procedure divide is not necessarily the controlling factor in determining when a federal court must apply state law (citations omitted)." (App. 49a) In holding that federal res judicata law governs successive diversity actions, the Third Circuit relies on cases that involve a federal question, where indeed, federal law is proper. (App. 53a) see also *In re* Kaplan v. First Options of Chicago Inc., 143 F.3d 807, 814-15 (3d Cir. 1998) and Rycoline Products, Inc. v. C&W Unlimited, 109 F.3d 883 (3d Cir. 1997).

In Rycoline, the Third Circuit panel held that the entire controversy doctrine is "an aspect of the substantive

law of New Jersey, by virtue of the Full Faith and Credit Act" (citations omitted) (App. 52a). Although the Third Circuit in the instant matter confined their holding in Rycoline to mean that New Jersey law governs the preclusive effects of an earlier New Jersey **state court** judgment, cases following Rycoline interpreted that holding to be "substantive" and not procedural. See, e.g., Galbraith v. Lenape Regional High School Dist., 964 F.Supp. 889 (D.N.J. 1997); J.H.R. v. Board of Ed. of the Township of East Brunswick, 308 N.J.Super. 100, 705 A.2d 766 (Super. Ct. App. Div. 1998).

The Third Circuit's constrained application has dislodged the entire controversy doctrine from its jurisprudential foundations and has turned it into a reward for plaintiffs strategically inclined to experiment with foreign jurisdictions before ultimately filing suit in New Jersey.

III. The Equitable Considerations Of The Entire Controversy Doctrine Require Its Application Considering Paramount Had Multiple Opportunities To Raise Its Claims, But Rather, Chose To Piecemeal The Litigation.

The doctrine will be applied against a party who had a "fair and reasonable opportunity" too fully litigate a disputed claim in a prior action. Kozyra, 973 F.2d at 1112. "The doctrine requires that a component of the controversy may not be unfairly withheld. A withholding is unfair if it effectively renders the pending litigation `merely one inning of the whole ball game.' " Id. (quoting Wm. Blanchard Co. v. Beach Concrete Co. Inc., 150 N.J. Super. 277 (Super. Ct. App. Div. 1977), *cert. denied*, 75 N.J. 528 (1977)).

Since the doctrine was incorporated into the New Jersey constitution, the doctrine has evolved to become "a mandatory rule for the joinder of virtually all causes, claims, and defenses ... ." Cogdell, 116 N.J. at 16; See, e.g., Steiner

v. Stein, 2 N.J. 367, 66 A.2d. 713 (1949) (requiring joinder of legal claims even when equitable claims have been decided); Massari v. Einsiedler, 6 N.J. 303, 78 A.2d 572 (1951) (requiring joinder of all defenses); Ajamian v. Schlanger, 14 N.J. 483, *cert. denied*, 348 U.S. 835 (1954) (requiring joinder of affirmative claims that could be brought as counterclaims), Wm. Blanchard Co. v. Beach Concrete Co. Inc., 150 N.J. Super. 277 (Super. Ct. App. Div. 1977), *cert. denied*, 75 N.J. 528 (1977) (requiring joinder of any and all cross-claims and counterclaims by defendants that arise out of the underlying transaction).

Whether successive claims constitute one controversy, and thus are subject to preclusion by the entire controversy doctrine, depends on whether the claims "arise from related facts or the same transactions or series of transactions." Ditrolio v. Antiles, 142 N.J. 253, 267 662 A.2d 494 (1995). The test for "relatedness" is as follows:

> If parties or persons will, after final judgment is entered, be likely to have to engage in additional litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions, the omitted components of the dispute or controversy must be regarded as constituting an element of one mandatory unit of litigation.

Ditrolio, 142 N.J. at 268 (citing O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d Cir. 1989)); accord Electro-Miniatures Corp. v. Wendon Co. Inc., 889 F.2d 41, 45 (3d Cir. 1989).

In the present case, Paramount alleges damages arising from an accident that occurred on October 10, 1989. The alleged damages were immediate in effect, beginning on the accident date and carrying forward, including lost maintenance and spot charter revenues from the subject

helicopter, lost maintenance and spot charter revenues from another Agusta helicopter, and "[l]oss of nearly all other helicopter management services business and charter income which existed, or could with reasonable certainty have been anticipated, as of the date of the crash of the Accident Helicopter." Thus, pursuant to the entire controversy doctrine, Paramount was required to assert any affirmative claims in the first lawsuit initiated after October 10, 1989, that "derived" from the subject accident.

The entire controversy doctrine was applied to a situation similar to the present case, that is, a lawsuit involving co-defendants from a prior action. Kozyra. In Kozyra, a three-vehicle accident occurred on May 17, 1988, in which one driver brought a personal injury action against the other two drivers and against a driver's employer. The Kozyra plaintiff's Answer included a cross-claim against the Kozyra defendants for contribution, but the Answer did not include any affirmative claims for damages. Kozyra, 973 F.2d at 1111.

After the first action settled, one co-defendant brought a second, personal injury action against the other co-defendants. When an arbitrator found for the plaintiff in the second action, the defendants moved to dismiss the second lawsuit on the ground that the second lawsuit was barred by the entire controversy doctrine. The federal district court granted defendants' motion and plaintiff appealed. Id.

Essentially, the issue before the court was the fairness of barring plaintiff's lawsuit, when she had been represented in the first lawsuit by counsel appointed by her insurance carrier, and the appointed counsel had never advised plaintiff about her rights involving her personal injury claim. Id. at 1112-14. In affirming the dismissal, the court pointed out

that: plaintiff had received the pleadings in the first action and was aware that she had been sued; plaintiff had a year following receipt of those papers to look into her legal rights before the first action had settled; plaintiff did not claim that she was unaware of her injury; defendants would be prejudiced having to relitigate the entire controversy; and allowing the second lawsuit to proceed would undermine the accomplishments of the first lawsuit. Id. at 1113. In a footnote, the court suggested that plaintiff's proper legal remedy was a legal malpractice action against her insurance carrier. Id. at 1114 n.2.

As in Kozyra, Paramount was aware of the Kent lawsuit and, as evidenced by the PAC I lawsuit, believed that it had suffered damages because of the subject accident. However, rather than proceed with the PAC I lawsuit, Paramount withdrew its action. Rather than amend its Answer in the Kent action to include affirmative claims for damages from Agusta, Paramount with Agusta settled the Kent lawsuit. Rather than assert affirmative claims for relief in the Trump action, Paramount successfully moved to dismiss the lawsuit with Agusta. Rather than assert affirmative claims for relief in the FSQ action, Paramount's answer simply denied the allegations in Agusta's Third-Party Complaint. It was only after the Kent lawsuit settled and after Trump defendants' motion was granted, that Paramount attempted to seek another at bat, another "inning" in the game.

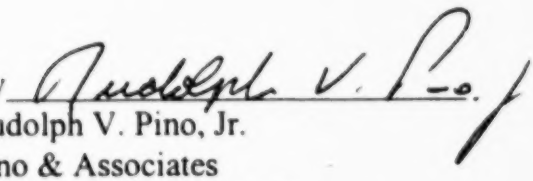
The doctrine serves the twin goals of "efficient judicial administration" and "fairness," and results in "the comprehensive and conclusive determination of a legal controversy." Prevratil v. Mohr, 279 N.J. Super. 652, 653 A.2d 1190 (Super. Ct. App. Div. 1995). After three prior lawsuits arising from the subject controversy, Paramount now attempts to avoid the "comprehensive and conclusive determination" arrived at between the parties to seek

affirmative damages. The unfairness to Petitioners, in light of the PAC I abandonment, the Kent settlement, the Trump motion to dismiss, and the FSQ Third-Party Answer, is exactly what the entire controversy doctrine is intended to prevent.

CONCLUSION

The Petition for a Writ of Certiorari is meritorious, and should be granted.

Respectfully submitted,

By 

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August 10, 1999

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PARAMOUNT AVIATION CORPORATION,

Plaintiff,

V.

Civil Action No. 91-4954

GRUPPO AGUSTA, AGUSTA AEROSPACE CORPORATION, COSTRUZIONE AERONAUTICHE GIOVANNI AGUSTA, S.p.A., and AGUSTA, S.p.A.,

OPINION

Defendants.

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BISSELL, District Judge

This matter comes before the Court on Defendants Agusta Aerospace Corporation ("AAC"), Costruzioni Aeronautiche Giovanni Agusta ("CAGA"), S.p.A. and Agusta S.p.A.'s (collectively, the Agusta defendants") motion for Summary Judgment[1]. They argue that the plaintiff's claims are barred by operation of the Entire Controversy Doctrine under New Jersey law and the operation of the U.C.C. as interpreted by the Supreme Court of New Jersey in Sorina motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555 (1985).

This Court has jurisdiction pursuant to 28 U.S.C. 5 1332.

FACTS

On October 10, 1989 an Agusta 109A helicopter crashed in Lacey Township, New Jersey, killing the pilot, co-pilot, and three passengers. The passengers were employees of Trump Taj Mahal Associates, Trump Castle Associates, and/or Trump Plaza Associates ("Trump").

The helicopter was manufactured by CAGA and purchased by AAC[2]. AAC then sold it to Soundview

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[1] A Return of Service/Proof of Service on Registered Agent was filed as to Defendant Gruppo Agusta. Gruppo Agusta has made no appearance, nor has the entry of default been sought. It is unclear if "Gruppo Agusta" is a legal entity or merely a name by which the Agusta defendants refer to themselves collectively. See Compl. at ¶ 6.

[2] Costruzioni Aeronautiche Giovanni Agusta, S.p.A. is a subsidiary of Agusta S.p.A. and part of Gruppo Agusta. Agusta Aerospace Corporation is CAGA's wholly owned U.S. subsidiary.

Leasing which sold it to Clifton Park Association which sold it to FSQ Air charter Corporation ("FSQ"). Plaintiff Paramount Aviation Corporation ("Paramount") arranged for the sale of the helicopter to FSQ, and contracted with FSQ to manage the aircraft and supply one of the two pilots who operated it.

As a result of the crash, a number of lawsuits were commenced in different courts.

Kent v. Costruzione Aeronautiche Giovanni Agusta, Agusta, Gruppa Agusta, Agusta Aviation Corp. and Paramount Aviation

This case was filed in the United States District Court for the Eastern District of Pennsylvania on March 30, 1990 by the wife and estate of co-pilot Robert Kent for damages as a result of his death. AAC, CAGA and Agusta filed answers asserting cross-claims against Paramount for contribution and indemnification. Paramount's answer included cross-claims for contribution and indemnification against the Agusta defendants, but no affirmative claim. The Kent suit was settled on November 27, 1990 for $3,150,000, with the Agusta defendants paying $2,900,000 and Paramount paying $250,000.

Trump Taj Mahal Assocs., Trump Castle Assocs., Trump Plaza Assocs., and Helicopter Air Services, Inc. v. Costruzioni Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, Agusta Aviation Corp, and Paramount Aviation

This case, filed in the Superior Court of New Jersey, Atlantic County Law Division, in July 1990, sought damages for the injury to the plaintiffs, businesses as a result of the death of the executives in the crash. The case was removed to this District before the Honorable John F. Gerry. Prior to serving answers, the defendants filed motions for summary

judgment and dismissal. Chief Judge Gerry dismissed all counts of that complaint on April 11, 1991.

In a reported Opinion, Judge Gerry ruled that the plaintiff employers were barred from seeking recovery of worker's compensation benefits paid to their executives, beneficiaries, that New Jersey's wrongful death statute precluded these employers from recovery of economic damages attributable to the death of their executives, that claims for alleged destruction and failure to preserve evidence were not recognized under New Jersey law and that the complaint failed to state a cognizable claim for willful and intentional interference with contractual relations between the plaintiff employers and their deceased executives. Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., 761 F. Supp. 1143 (D.N.J. 1991, aff'd without opinion, 958 F.2d 365 (3d Cir. 1992, cert. denied, 506 U.S. 826, (1992). Accordingly, claims such as those between the parties in the case at bar (co-defendants in Trump Tal Mahal) were never raised in that action; nor did the occasion for the assertion of such claims arise in that action.[3]

FSQ Air Charter Corp. v. Costruzione Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, Agusta Aviation Corporation

This action was filed on April 11, 1991 in the United States District Court for the Eastern District of New York. AAC filed a third-party complaint against Paramount in that action, and Paramount answered. Paramount did not raise any affirmative defenses or counterclaims against AAC. This action was settled in June 1992 with an exchange of

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[3] However, as explored hereafter, Kent and FSQ present a different picture.

mutual releases that specifically excluded the claims in the instant action and the Trump action.

Paramount Aviation v. Gruppo Agusta, Agusta Aerospace Corporation, Costruzione Aeronautiche Giovanni Agusta, S.p.A. and Agusta S.p.A.
- ("PAC I")

This case filed in the United States District Court for the District of New Jersey on July 11, 1990 involved a complaint by Paramount stating seven counts: Strict Liability in Tort; Fraud; Gross Negligence, Wilful Misconduct, Wantonness and outrageous Conduct; Negligence; Breach of Express and Implied Warranties; Willful Destruction and Spoliation of Evidence; and Fraud and Deceit. Paramount claimed that, as a result of the crash, it suffered "adverse publicity, public hostility and ridicule, loss of clients, loss of goodwill and standing in the industry, loss of income and other damages."

On August 16, 1990, pursuant to Fed. R. Civ. P. 41, Paramount voluntarily dismissed the complaint, without prejudice, prior to answers by any defendant. At that point in time, the Kent litigation, to which Paramount was a party, was still pending.

Paramount Aviation v. Gruppo Agusta, Agusta Aerospace Corporation, Costruzione Aeronautiche Giovanni Agusta, S.p.A. and Agusta S.p.A.
- ("PAC II")

The litigation now pending before this court was originally filed in the Superior Court of New Jersey, Morris County Law Division on October 7, 1991. This Complaint states two counts: Negligence, Gross Negligence, Willful and Reckless Misconduct; and Strict Liability in Tort. The other counts in PAC I were not reasserted in the present action.

Paramount seeks damages for several types of lost income, loss of goodwill, and other economic losses. (Compl. at ¶ 33). These damages arose as a result of the crash and/or the Agusta defendants, manufacture and design which allegedly caused the crash. (Compl. at ¶¶ 29-30, 36-37).

Defendants removed PAC II to this Court on November 12, 1991. Defendants CAGA, Agusta and AAC each filed answers, with AAC also stating a counterclaim against Paramount. The counterclaim is for rents allegedly due and owing for another Agusta helicopter and payment for spare helicopter parts, service and training. As noted above all previous actions have been concluded some five to seven years ago.

ANALYSIS

1. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the Pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, Fed. R. Civ. Pro. 56 (c) ; see also Chipollini v. Spencer Gifts, Inc., 814 F. 2d 893, 896 (3d Cir.) en banc, cert. dismissed, 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. Continental Insurance Co. v. Bodie, 682 F. 2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask ... not whether .. the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the (non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the (non-movant) is entitled to a verdict
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> ....

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine," if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. Id.

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence," in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings.,, Anderson v. Liberty Lobby, 477 U.S. 242, 249, 325 (1986); see also Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 72 (3d Cir. 1990). Only evidence that would be admissible at trial may be used to test a summary judgment motion. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Evidence with a deficient foundation must be excluded from consideration. Williams v. Borough of West Chester, PA, 891 F.2d 458, 466 (3d Cir. 1989) see also Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs, 982 F.2d 884, 890-91 (3d Cir. 1992).

II. Entire Controversy Doctrine

New Jersey's "entire controversy rule," set forth in Rule 4:30A of the Rules Governing Civil Practice, states that

> [n]on-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine ....

Comment 1 to the Rule indicates that the legislature intentionally left the scope of the Rule to be defined by case law. Comment 1, Rule 4:30A, Rules Governing Civil Practice.

Central to the entire controversy rule and the doctrine that underlies it is a recognition of the need for judicial economy. In Guidice v. Drew Chemical Corp., the Appellate Division of the New Jersey Superior Court noted that the entire controversy doctrine is a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims between the same parties arising out of or relating to the same transactional circumstances to be joined in a single action. The effect of the doctrine is to preclude a party from withholding from the action for separate and later litigation a constituent part of the controversy even where that component is a separate and independently cognizable cause of action. [citation omitted.] 210 N.J. Super. 32, 41 (App. Div. 1986), remanded on other grounds, 104 N.J.465 (1986) (quoting Brown v. Brown, 208 N.J. Super. 372 (App. Div. 1986)).

The entire controversy doctrine applies to claims arising prior to and during the pendency of a litigation. Brown v. Brown, 208 N.J. Super 372, 379 (App. Div. 1986). The doctrine does not apply to bar component claims either unknown, unarisen or unaccrued at the time of the

original action. Zarcomb v. Borucka, 166 N.J. Super. 22 (App. Div. 1979). The doctrine constitutes an affirmative defense to be raised by way of summary judgment if such a disposition is otherwise appropriate under Fed. R. Civ. P. 56(b). Rycoline Products, Inc. v. C&W Unlimited, et al., _F.3d __ No. 96-5788, slip op. at 8 (3d. Cir. March 25, 1997). It does not implicate any lack of jurisdiction. Id.

A. Waiver

Plaintiff argues that Defendants have waived the entire controversy doctrine defense by not pleading it affirmatively in their Answers. Plaintiffs are correct that "the entire controversy doctrine is an affirmative defense which is waived if not pleaded or otherwise timely raised., B. F. v. Division of Youth and Family Svcs., 296 N.J. Super. 372, 382 (App. Div. 1996) (quoting Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986) see also Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375 (App. Div. 1997) (same).

Failure to raise an affirmative defense in a responsive pleading does not always result in a waiver of the defense. Charpentier v. Godsil, 937 F.2d 859, 863 (3d Cir. 1991). In the Federal system, the necessity of pleading such an affirmative defense must be viewed in light of the policy of liberally allowing amendments under Federal Rule of Civil Procedure 15(a)[4]. Kleinknecht v. Gettysburg College, 989

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[4] Fed. R. Civ. P. 15 (a) governs a motion to amend a complaint and provides, in pertinent part:

> (Beyond 20 days of service of the complaint], a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when Justice so requires.

F.2d 1360, 1374 (3d Cir. 1993). Where an affirmative defense is raised in a motion for summary judgment, a Court may address it on its merits if the defendant would otherwise have been granted leave to amend its answer. id. It is not necessary for this Court to deny the instant motion, grant a subsequent motion to amend, and then address the entire controversy defense anew. Cf. Burrell v. Quaranta, 259 N.J. Super. 243, 255 (App. Div. 1992) (holding entire controversy defense not foreclosed where trial judge would

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Fed. R. Civ. R. 15(a) (emphasis added). Leave to amend is freely granted and the reasons for denying such a motion must be clear:

> In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given". Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court ...

Foman v. Davis, 371 U.S. 178, 183 (1962); accord, U.S. v. Hougham, 364 U.S. 310 (1960) Skehan v. Trustees of Bloomsburg State College, 590 F.2d 470 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1979) ; Heyl & Patterson Intern. v. F.D. Rich Housing, 663 F.2d 419 (3d Cir. 1981), cert. denied, 455 U.S. 1018 (1982). The discretion of the district court is limited by considerations of prejudice to the nonmoving party; undue prejudice is "the touch-stone for the denial of leave to amend." Cornell & Co., Inc. v. Occup. S & H. Review Com'n, 573 F.2d 820 (3d Cir. 1978); accord, Foman, 371 U.S. at 182; Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321, 330-331 (1971) ; Skehan, 590 F.2d at 492; Heyl, 663 F.2d at 425. The liberal rules of amendment are premised on the express concern for the "just, speedy, and inexpensive determination of every action." Boileau v. Bethlehem Steel Corp., 730 F. 2d 929, 939 (3d Cir. 1984), cert. denied, 469 U.S. 871 (1984), quoting Fed. R. Civ. P. 1.

have granted leave to amend if asked)

The entire controversy defense raised here does not involve any questions of fact, but "presents only a question of law for resolution." Id.; Godsil, 937 F.2d at 864. Therefore, the exact form of any amendment would not affect the defense's availability.

Furthermore, plaintiff can show no prejudice from its inclusion. Given the lengthy history of litigation concerning the helicopter crash, it could not be unforeseen to the Plaintiff that the entire controversy doctrine might be implicated. Nor is the long delay between the filing of the Complaint and the instant motion prejudicial, as it is largely the result of Plaintiff's failure to vigorously prosecute this action. Finally, no argument has been made that discovery upon this newly-asserted defense is required. Accordingly, the Court will address the entire controversy defense on its merits.

B. Plaintiff's Claims

Plaintiff argues that the entire controversy doctrine is inapplicable in the present case because it is in federal court. This is simply not the case. The doctrine has been routinely applied in the courts of this jurisdiction. See, e.g. Petrocelli v. Daniel Woodhead Co., 993 F. 2d 27 (3d Cir. 1993); Kozyra v. Allen, 973 F. 2d 1110 (3d Cir, 1992) ; Rycoline Products, Inc. v. C&W Unlimited, et al. __ F.3d __ No. 96-5788, slip op. at 8 (3d. Cir. March 25, 1997). Plaintiffs mistakenly treat the doctrine as state procedural law due to its codification in N.J.R. 4:30A. However, the doctrine is a creature of New Jersey common law, and therefore applicable in a federal forum[5]. Erie R.R. v. Tompkins, 304

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[5] "[T]he (New Jersey Court) rule does not define the doctrine. That is best left to case law. It does, however, constitute a caution to the bar to be aware of potential claim preclusion against non-parties as well as

U.S. 64 (1938)

The Kent litigation in the Eastern District of Pennsylvania offered Paramount an opportunity to bring these claims against the Agusta defendants. In fact, Paramount did bring crossclaims for contribution and indemnity against them. Although Paramount may not have been required to bring the claims presented here in that forum, it may still be barred by the entire controversy doctrine from subsequent litigation of these claims in a New Jersey forum.

The New Jersey Supreme Court faced a very similar situation in Mortgageling v. Commonwealth Land Title, 142 N.J. 336 (1995). In Mortageling, the plaintiffs filed an action in the Eastern District of Pennsylvania against certain defendants. Id. at 340. Later, they filed a second action in New Jersey state court against different defendants. Id. The Law Division dismissed the complaint on the basis of the entire controversy doctrine.[6] Id. at 341. The New Jersey

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parties." N.J.R. 4:30A, cmt. 1. The doctrine has also been confirmed in the New Jersey Constitution. Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15 (1989) (citing Article 6, section 2, paragraph 4 of the 1947 Constitution).

[6] The Law Division's dismissal took place during the concurrent pendency of both the federal and state actions. Mortageling Corp. v. Commonwealth Land Title, 262 N.J. Super. 178, 182 (Law. Div. 1992). That decision was affirmed on appeal, but after the resolution of the first action. Mortgageling, 142 N.J. at 342 n.2; see also Rycoline, slip op. at 11 (discussing the procedural history of Mortgageling. Because neither of the appellate courts in Mortgageling mentioned the simultaneous pendency in rendering their decisions, it is unclear if this is an element to be considered in applying the entire controversy doctrine.

Panels of the Appellate Division and the Third Circuit have each determined that concurrent actions are not barred by the entire controversy doctrine. Kaselaan & D'Angelo v. Soffian, 290 N.J. Super. 293 (App. Div. 1996); Rycoline; contra Kelly v. Borough of Sayreville, 927 F. Supp. 797 (D.N.J. 1996), aff'd No. 96-5342, 1997 WL 92050 (3d

Supreme Court affirmed the dismissal.

The Supreme Court held "that when a party deliberately chooses to fragment litigation by suing certain parties in another jurisdiction and withholds claims against other parties, a New Jersey court need not later entertain the claims against the omitted parties if jurisdiction was available in the first forum." Mortgageling, 142 N.J. at 338. In this case, Paramount deliberately chose to fragment the litigation by bringing certain claims against the Agusta defendants in

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Cir. March 5, 1997); Pittston Co. v. Sedgewick James of New York, No. Civ. A. 96-1578, 1996 WL 617139, at *7-9 (D.N.J. Oct. 18, 1996). However, the New Jersey Supreme Court has yet to definitively speak on this issue. Ultimately, it is up to them to put "this jurisprudential genie back into its analytical bottle." Kelly v. Borough of Saverville, No. 96-5342, slip op. at 13 (3d Cir. March 5, 1997) (McKee, J., concurring) (district court error in applying entire controversy defense not due to concurrency).

Neither Kaselaan nor Rycoline addressed the situation where, as here, the other concurrent actions have concluded. Kaselaan, 290 N.J. Super. at 301 n. 1; Rycoline, slip op. at 14 n. 2. The facts of Mortgageling strongly suggest that, to whatever extent concurrent actions may not be barred by the entire controversy doctrine during their pendency, the remaining action will be barred following the conclusion of its companion litigation. Mortgageling 142 N.J. at 348. To hold otherwise would frustrate the goal of "fairness to the system of judicial administration" through a continuing waste of resources. Id. at 344. Although the similarities between the entire controversy doctrine and res judicata may militate that one of the proceedings reach a final adjudication, there can be no bar beyond that point. Otherwise, parties could circumvent the doctrine entirely -- making each action "merely one inning of the whole ball game", by starting those "innings" at the same time. Wm. Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super 277, 294 (App. Div. 1977) certif. denied 75 N.J. 528 (1977).

the Kent action while withholding other claims against them[7]. Those claims were clearly known to Paramount. They were two of the seven claims asserted in the complaint in PAC I while Kent was still pending. Paramount also failed to bring these claims in the FSQ litigation.

Paramount can show nothing which prevented the assertion of its present claims in the Kent and FSQ cases. Rule 4:30A put Paramount on notice of the possibility that it would be unable to bring such unasserted claims at a later date. That those actions were pending in another jurisdiction is immaterial. Mortgageling, 142 N.J. 338; Guidice, 210 N.J. Super. at 41-42. Strategic considerations, such as the possibility of settlement in Kent will not suffice. Defendants' motion for summary judgment is granted.[8]

C. AAC's Counterclaim

The Court has reason to believe that New Jersey's entire controversy doctrine would also bar AAC's counterclaim against Paramount. However, the claim does not arise out of the October 1989 helicopter crash, and plaintiff has made no formal motion for such relief. At oral argument, counsel for the plaintiff indicated that she might

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[7] Although Mortgageling dealt with party joinder, it should be equally applicable in the more traditional area of claims joinder. Mortgageling, 142 N.J. at 343 ("Heretofore our joinder rules have been understood to apply when claims have been omitted from proceedings in another jurisdiction.") (citing Giudice v. Drew Chemical Corp., 210 N.J. Super. 32 (App. Div. 1986), certif granted and summarily remanded on other grounds, 104 N.J. 465 (1986)

[8] In light of this disposition, the Court need not address defendants' Spring Motors argument and, therefore, chooses not to do so.

well pursue such a motion if defendants' was granted. That has now occurred. The Court requests that such a motion be filed within 30 days if plaintiff intends to proceed in that fashion.

CONCLUSION

For the foregoing reasons, Defendants, motion for summary judgment is granted as to all counts in the Complaint. An interesting question arises as to whether this dismissal should be with or without prejudice. Under classical analysis a summary judgment is with prejudice. Mortgageling, however, suggests otherwise. As in Mortgageling, the prior actions which trigger the entire controversy bar here were in other states: Kent in the Eastern District of Pennsylvania and FSQ in the Eastern District of New York. The New Jersey Supreme Court in Mortgageling dismissed the barred claims in that action, without prejudice to their being asserted in a foreign forum, in order that the Court "not export our entire controversy doctrine to other jurisdictions." Mortgageling, 142 N.J. at 338. Sitting in diversity and thus applying New Jersey law to that issue, this Court chooses the same course. The complaint is dismissed without prejudice.[9]

JOHN W. BISSELL
United States District Judge

DATED: April 4, 1997

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[9] As a practical matter, plaintiff's claims are probably now barred by any applicable statute of limitations; however, that is an affirmative defense to be asserted if those claims are refiled in a state or federal court not located in New Jersey.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PARAMOUNT AVIATION CORPORATION,:

Plaintiff,

V. Civil Action No. 91-4954

GRUPPO AGUSTA, AGUSTA AEROSPACE: CORPORATION, COSTRUZIONE AERONAUTICHE GIOVANNI AGUSTA, S.p.A., and AGUSTA, S.p.A., ORDER

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 4th day of April, 1997,

ORDERED that defendants' motion for summary judgment be and it hereby is granted, and plaintiff's complaint is hereby dismissed, without prejudice.

JOHN W. BISSELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PARAMOUNT AVIATION CORPORATION.:

Plaintiff,

Civil Action No. 91-4954

V.

ORDER

GRUPPO AGUSTA, AGUSTA AEROSPACE: CORPORATION COSTRUZIONE AERONAUTICHE GIOVANNI AGUSTA, S.p.A., and AGUSTA, S,p.A.,

Defendants.

By an opinion and Order dated April 4, 1997 this Court dismissed the claims of the plaintiff's Complaint, without prejudice, pursuant to New Jersey's entire controversy doctrine. The only surviving claim in this matter is a counterclaim of Agusta Aerospace Corporation (AAC) against the plaintiff for rents allegedly due and owing for an Agusta helicopter, and payment for spare helicopter parts, service and training. The helicopter involved in the counterclaim is not the one which crashed, leading to the multiple lawsuits reviewed in this Court's April 4 Opinion, including the claims in plaintiff's present Complaint. In that Opinion, the Court made the following observation regarding AAC's counterclaim and its possible vulnerability to the entire controversy doctrine.

> The Court has reason to believe that New Jersey's entire controversy doctrine would also bar AAC's counterclaim against Paramount. However, the claim does not

> arise out of the October 1989 helicopter crash, and plaintiff has made no formal motion for such relief. At oral argument, counsel for the plaintiff indicated that she might well pursue such a motion if defendants' was granted. That has now occurred. The Court requests that such a motion be filed within 30 days if plaintiff intends to proceed in that fashion.

(Op. dated Apr. 4, 1997 at 15). Among the considerations which the Court had in mind at that time was the following allegation at paragraph 3 of the counterclaim: "This counterclaim arises out of the same transaction or occurrence which is the subject matter of the plaintiff's Complaint and the Court's jurisdiction over this counterclaim is proper under the doctrine of ancillary jurisdiction."

In response to the excerpt from the April 4 Opinion cited above, plaintiff filed a motion for reconsideration or, in the alternative, a motion for certification of this Court's decision pursuant to 28 U.S.C. § 1292(b). Although styled as a motion for reconsideration, the plaintiff actually requested that this Court grant summary judgment, sua sponte, dismissing AAC's counterclaim based upon the entire controversy doctrine. The Court determined that adequate notice of the possibility of such relief had been provided to all parties and called for subsequent briefs on the issue. Letter-memoranda were filed on behalf of both plaintiff and AAC which the Court has considered carefully.

While the entire controversy doctrine in New Jersey is quite broad in scope, it is not without its limitations, as reflected in recent decisions of the Supreme Court of New Jersey. As stated by that Court in Joel v. Morocco, 147 N.J. 546, 548 (1997), the doctrine requires parties to a controversy before a court to assert all claims known to them that stem from the same transactional facts...." the companion decision in Gelber v. Zito Partnership, 147 N.J.

561 (1997). In the case at bar, AAC's counterclaim is essentially a collection action presented in a conventional fashion in five counts: 2 for breach of contract, two for conversion and one for an account stated. The facts relevant to claims resulting from the October 10, 1989 crash of a different Agusta helicopter bear no relationship to the transactions which are the subject of the counterclaim. Plaintiff argues that "the debilitating effects' of the October 1989 accident upon its overall business caused "the inability to meet contractual obligations" such as those in the counterclaim. (Plaintiff's Letter-Memo, Aug. 4, 1997 at 2) While serving as an explanation for the accumulated debts which form the subject of the counterclaim, those allegations are hardly material. Indeed, the Court doubts that such equitable assertions could be presented as a defense to the basic action at law set forth in the counterclaim. The Court has not ignored the allegation in paragraph 3 of the counterclaim quoted above. However, that statement merely parrots the language of Fed. R. Civ. P. 13(a) describing a compulsory counterclaim. At most, it is a weak admission entitled to little weight. In reality, this is a permissive (not compulsory) counterclaim within the purview of Fed. R. Civ. P. 13(b) . Accordingly, AAC's counterclaim in this action is not barred by the entire controversy doctrine which would compel AAC to have raised it in any prior litigation.

The plaintiff has also requested the Court to certify its April 4 Opinion and Order for interlocutory appeal pursuant to 28 U. S. C. ¶ 1292 (b). However, this Court is not of the opinion that this decision and Order involve a material question of law as to which there is substantial ground for difference of opinion. The bar of the entire controversy doctrine to the claims in plaintiff's Complaint is clear. Secondly, an immediate appeal from the April 4, 1997 order would not materially advance the ultimate termination of this litigation. Only AAC's counterclaim remains in this action. The Court believes that this claim can promptly be disposed

of either by settlement, dispositive motions or trial.

Accordingly, for the reasons set forth above,

It is on this 9th day of October, 1997, **ORDERED** that:

1. Plaintiff's motions are denied;

2. The counterclaim of the defendant Agusta Aerospace Corporation is not barred by New Jersey's entire controversy doctrine;.and

3. The Court declines to certify this matter for interlocutory appeal under 28 U.S.C. § 1292(b).

JOHN W. BISSELL
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PARAMOUNT AVIATION CORPORATION,:

Plaintiff,

V. Civil Action No. 91-4954

GRUPPO AGUSTA; AGUSTA AEROSPACE: OPINION
CORPORATION; COSTRUZIONE
AERONAUTICHE GIOVANNI AGUSTA, :
S.p.A., and AGUSTA, S.p.A.,

Defendants.

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BISSELL, District Judge

This matter comes before the Court on plaintiff Paramount Aviation Corporation's ("Paramount's") motion to vacate the entry of summary judgment in favor of defendants Agusta Aerospace Corporation ("AAC"), Costruzione Aeronautiche Giovanni Agusta, S.p.A. ("CAGA"), and Agusta S.p.A.' s (collectively "the Agusta Defendants") dismissing plaintiff's claims.[1] The Court granted summary judgment in favor of the Agusta defendants in an Order of April 4, 1997, based on its determination that the entire controversy doctrine bars plaintiff's claims.

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

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[1] A Return of Service/Proof of Service on Registered Agent was filed as to defendant Gruppo Agusta. Gruppa Agusta has made no appearance, nor has the entry of default been sought. It is unclear if "Gruppo Agusta" is a legal entity or merely a name by which the Agusta defendants refer to themselves collectively. (See Compl., ¶ 6).

FACTS

As the Court explained in the Opinion accompanying its April 4, 1997 Order, the following are the basic facts underlying this action and the Agusta defendants' motion for summary judgment. On October 10, 1989, an Agusta 109A helicopter crashed in Lacey Township, New Jersey, killing the pilot, co-pilot, and three passengers. The passengers were employees of Trump Taj Mahal Associates, Trump Castle Associates, and/or Trump Plaza Associates("Trump")

The helicopter was manufactured by CAGA and purchased by AAC.[2] AAC then sold it to Soundview Leasing which sold it to Clifton Park Association which sold it to FSQ Air Charter Corporation ("FSQ") Plaintiff Paramount Aviation Corporation ("Paramount") arranged for the sale of the helicopter to FSA and contracted with FSQ to manage the aircraft and supply one of the two pilots who operated it.

As a result of the crash, a number of lawsuits were commenced in different courts.

Kent v. Costruzione Aeronautiche Giovanni Agusta, Agusta, Gruppa Agusta, Agusta Aviation Corp. and Paramount Aviation, Inc.

This case was filed in the United States District Court for the Eastern District of Pennsylvania on March 30, 1990 by the wife and estate of co-pilot Robert Kent for damages as a result of his death. AAC, CAGA and Agusta filed answers asserting cross-claims against Paramount for contribution and indemnification. Paramount's answer included cross-claims for contribution and indemnification

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[2] Costruzione Aeronautiche Giovanni Agusta, S.p.A. is a subsidiary of Agusta S.p.A. and part of Gruppo Agusta. Agusta Aerospace Corporation is CAGA's wholly owned U.S. subsidiary.

against the Agusta defendants, but no affirmative claim. The Kent suit was settled on November 27, 1990 for $3,150,000, with the Agusta defendants paying $2,900,000 and Paramount paying $250,000.

Trump Taj Mahal Assocs., Trump Castle Assocs., Trump Plaza Assocs., and Helicopter Air Services, Inc. v. Costruzione Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, Agusta Aviation Corp. and Paramount Aviation

This case, filed in the Superior Court of New Jersey, Law Division, Atlantic County, in July 1990, sought damages for the injury to the plaintiffs' businesses as a result of the crash. The case was removed to this district before the Honorable John F. Gerry. Prior to serving answers, the defendants filed motions for dismissal. Chief Judge Gerry dismissed all counts of that complaint on April 11, 1991.

In a reported Opinion, Judge Gerry ruled that the plaintiff employers were barred from seeking recovery of worker's compensation benefits paid to their executives' beneficiaries, that New Jersey's wrongful death statute precluded these employers from recovering economic damages attributable to the death of their executives, that claims for alleged destruction and failure to preserve evidence were not recognized under New Jersey law and that the complaint failed to state a cognizable claim for willful and intentional interference with contractual relations between the plaintiff-employers and their deceased executives. Trump Taj Mahal Associates v. Costruzione Aeronautiche Giovanni Agusta, S.p.A., 761 F. Supp. 1143 (D.N.J. 1991), aff'd without opinion, 958 F.2d 365 (3d Cir. 1992), cert. denied, 506 U.S. 826 (1992). Accordingly, the court concluded in its April 4, 1997 opinion, claims such as those between the parties in the case at bar (co-defendants in Trump Tal Mahal) were never raised in that action; nor did

the occasion for the assertion of such claims arise there.

FSQ Air Charter Corp. v. Costruzione Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, Agusta Aviation Corporation

This action was filed on April 11, 1991 in the United States District Court for the Eastern District of New York. AAC filed a third-party complaint against Paramount in that action, arid Paramount answered. Paramount did not raise any affirmative defenses or counterclaims against AAC. The action was settled in June 1992 with an exchange of mutual releases that specifically excluded the claims in the instant action and the Trump action.

Paramount Aviation v. Gruppo Agusta, Agusta Aerospace Corporation, Costruzione Aeronautiche Giovanni Agusta, S.p.A. and Agusta S.p.A. - ("PAC")

This case was filed in the United States District Court for the District of New Jersey on July 11, 1990. Paramount's complaint stated seven counts: strict liability in tort; fraud; gross negligence, willful misconduct, wantonness and outrageous conduct; negligence; breach of express and implied warranties; willful destruction and spoliation of evidence; and fraud and deceit. Paramount claimed that, as a result of the crash, it suffered "adverse publicity, public hostility and ridicule, loss of clients, loss of goodwill and standing in the industry, loss of income and other damages."

On August 16, 1990, pursuant to Fed. R. Civ. P. 41, Paramount voluntarily dismissed the complaint, without prejudice, prior to answers by any defendant. At that point in time, the Kent litigation, to which Paramount was a party, was still pending.

Paramount Aviation v. Gruppo Agusta, Agusta Aerospace Corporation, Costruzione Aeronautiche Giovanni Agusta, S.p.A. and Agusta S.p.A. - ("PAC I")

The litigation now pending before this Court was originally filed in the Superior Court of New Jersey, Law Division, Morris County on October 7, 1991. This complaint states two counts: negligence, gross negligence, willful and reckless misconduct; and strict liability in tort. The other counts in PAC I were not reasserted in the present action. Paramount seeks damages for several types of lost income, loss of goodwill, and other economic losses. (Compl., ¶ 33). These damages arose as a result of the crash and/or the Agusta defendants' manufacture and design which allegedly caused the crash. (Compl., ¶¶ 29-30, 36-37).

Defendants removed PAC II to this Court on November 12, 1991. Defendants CAGA, Agusta and AAC each filed answers, with AAC also stating a counterclaim against Paramount. The counterclaim is for rents allegedly due and owing for another Agusta helicopter and payment for spare helicopter parts, service and training. Although the Court granted summary judgment to the Agusta defendants over a year ago, PAC II remains pending because of AAC's counterclaim. AAC filed a motion for summary judgment on its counterclaim on May 22, 1998.

ANALYSIS

Plaintiff asks the Court to vacate its April 4, 1997 Order granting summary judgment to the Agusta defendants. In support of its motion, plaintiff argues that intervening decisions of the New Jersey Supreme Court in Olds v. Donnelly, 150 N.J. 424 (1997); Karpovich v. Barabula, 150 N.J. 473 (1997); Donohue v. Kuhn 150 N.J. 484 (1997); and

Oliver v. Ambrose 152 N.J. 383 (1998), demonstrate that, contrary to the Court's earlier conclusion, New Jersey's entire controversy doctrine does not bar a subsequent legal malpractice action. Oliver holds that the entire controversy doctrine applies to family law actions.

I. Standard

Plaintiff argues that the Court's Order should be vacated under Fed. R. Civ. P. 60(b). Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Court of Appeals for the Third Circuit explained in Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976 (1978): "The general purpose of Rule 60 ... is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must

be done." Id. at 977).

Plaintiff appears to rely on the catch-all provision in Fed. R. Civ. P. 60(b)(6). It cites Overbee v. Van Waters & Rogers, 765 F.2d 578 (6th Cir. 1985). In that case, the Court of Appeals for the Sixth Circuit held that a district court erred in denying a Rule-60(b)(6) motion. 765 F.2d at 6 579. The state supreme court had reversed one of its own prior decisions, making the district court "clearly in error" on a question of state law. (Id.) The Court of Appeals determined that "extraordinary" circumstances required that the Rule 60(b)(6) motion be granted. 765 F.2d at 580; see also Boughner, 572 F.2d at 978 ("Rule 60(b)(6) ... provides an extraordinary remedy and may be invoked only on a showing of exceptional circumstances.") Although the Court of Appeals recognized, numerous courts have held that the mere showing of a change in the law is not enough to demonstrate ... an extraordinary situation when the judgment has become final," 765 F2d at 580, it reasoned that the judgment in question was not final and it was highly unusual for the state supreme court to reverse itself within a year. (Id.)

As plaintiff notes, the New Jersey Supreme Court specifically provided in Olds that the decision should apply to "all pending cases, whether on appeal or in the trial courts." Olds 150 N.J. at 449. The Supreme Court explained: "Giving the benefit of our decision to litigants with pending cases serves the interests of justice by permitting resolution of their claims on the merits." (Id. at 450).

Defendants do not argue that it would be procedurally inappropriate to vacate the Court's Order granting summary judgment at this stage in the litigation. Rather, they contend that the recently decided New Jersey Supreme Court cases cited by plaintiff do not undermine the reasoning behind the Court's April 4, 1997 Order. The Court will assume, in order to reach the heart of this motion, that if the recently

decided New Jersey cases indicate that the Court's April 4, 1997 Order was wrongly entered, the Court may now vacate that Order on the theory that extraordinary circumstances exist because this case remains open and the New Jersey Supreme Court explicitly rendered its recent pronouncements applicable to pending cases.

II. Application

Nonetheless, the Court will not vacate its Order granting summary judgment to the Agusta defendants. The Court concludes that its dismissal of plaintiff's claims based on the entire controversy doctrine remains sound, notwithstanding the New Jersey Supreme Court's recent explications on the entire controversy doctrine. Three of the cases cited by plaintiff, Olds v. Donnelly, 150 N.J. at 424; Karpovich v. Barabula, 150 N.J. at 473; and Donohue v. Kuhn, 150 N.J. at 484, address the necessity of joining parties, not claims, to assert a subsequent legal malpractice claim; they do not have the broad implications for the entire controversy doctrine that plaintiff suggests. The fourth case cited by plaintiff, Oliver v. Ambrose, 152 N.J. at 383, relates, like this case, to the necessity of joining claims, not parties, but articulates no change in law that implicates the Court's Order.

Plaintiff first argues that the new cases clearly establish that the entire controversy doctrine does not apply to plaintiff's assertion of its claims here since Paramount was not actually required to bring its claims against the Agusta defendants in Kent and FSQ. In addition, plaintiff argues that the recent cases show that even if the entire controversy doctrine applies here, plaintiff's claims should not be precluded because preclusion is a remedy of last resort for vindicating the doctrine's purposes.

The Court did conclude in connection with its April 4, 1997 order that plaintiff was not required to assert its

claims in the earlier fora. It explained:

> The Kent litigation in the Eastern District of Pennsylvania offered Paramount an opportunity to bring these claims against the Agusta defendants. In fact, Paramount did bring crossclaims for contribution and indemnity against them. Although paramount may not have been required to bring the claims presented here in that forum, it may still be barred by the entire controversy doctrine from subsequent litigation of these claims in a New Jersey forum.

(Op., Apr. 4, 1997 at 12). The Court determined the same to be true with respect to the FSQ litigation. (Id. at 14 ("Paramount can show nothing which prevented the assertion of its present claim in the Kent and FSQ cases.")).

However, the Court does not agree with plaintiff that Olds establishes that the entire controversy doctrine does not apply to claims about which a party was not required to notify the court in an earlier proceeding. In support of its interpretation, plaintiff cites part of the passage in Olds which states:

> Before precluding a second action, a court must determine whether the plaintiff in the earlier action was required to notify the court of the party alleging preclusion. See DiTrolio [v. Antiles], 142 N.J. 253, 271 (1995) ("the determinative consideration is whether distinct claims are aspects of the single larger controversy because they arise from interrelated facts."). If notice was required the court must discern whether the plaintiff complies with the requirements of the rules in

> the prior litigation. Although unnecessary, a formal motion under Rule 4:28 to join a party would suffice. The plaintiff need only notify the first trial court of the party now alleging preclusion. Failure to comply with those requirements need not lead to preclusion in the second action. Gelber v. Zito Partnership, 147 N.J. 561, 565 (1997)) ("[T]he court did not intend the violation of the notice requirements of Rule 4:5-1 should result in automatic orders of dismissal.") If a remedy other than preclusion will vindicate the cost or prejudice to other parties and the judicial system, the court should employ such a remedy.

150 N.J. at 448. This passage, by its terms, discusses the application of the entire controversy doctrine to party joinder, not claims joinder, and, indeed, it comes in the context of a lengthy discussion of party joinder and entire controversy doctrine preclusion. See 150 N.J. 447-49.

In Oliver v. Ambrose, 152 N.J. 383 (1998), the recent claims joinder decision cited by plaintiff, the New Jersey Supreme Court indicates no change to the rule that the entire controversy doctrine applies to claims not brought in an earlier action that arise out of the same underlying facts. That case begins its discussion of the entire controversy doctrine by recounting: "For over sixty years, it has been established in New Jersey that the entire controversy doctrine requires the mandatory joinder of all claims to a single transaction." (Id. at 392). The opinion continues:

> The entire controversy doctrine encompasses "virtually all causes, claims, and defenses relating to a controversy... "At a minimum, all parties to a suit should assert affirmative

> claims and defenses arising out of the underlying controversy." [T]he doctrine also includes counterclaims and cross-claims .... In applying the doctrine, "[i]t is the core set of facts that provides the link between distinct claims against the same parties ... and triggers the requirement that they be determined in one proceeding.,"

(Id. at 395) (citations omitted). The Supreme Court further affirmed: "Claims stemming from the same core of facts should be raised in one action. [T]he goal is to avoid fractionalized and successive litigation...." (Id. at 397). Nowhere in that case does the state Supreme Court indicate the existence of any new rule that if a party was not required to give notice of claims against another party to the court in an earlier proceeding, the entire controversy doctrine does not apply to its subsequent assertion of those claims. Plaintiff's claims here arise out of the same core set of facts as those in Kent and FSQ. Thus, notwithstanding Olds, under Oliver and under the cases cited in this Court's earlier Opinion, the entire controversy doctrine required that they be brought in one of the earlier proceedings.[3]

As plaintiff notes, the New Jersey Supreme Court also stated in Olds: "If a remedy other than preclusion will vindicate the cost or prejudice to other parties and the judicial system, the court should employ such a remedy." 150 N.J. at 448. This observation, too, arose in the context

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[3] The Court acknowledges that its April 4, 1997 decision relied heavily on another party joinder case, Mortgageling Corp. V. Commonwealth Land Title Insur. Co., 142 N.J. 336 (1995), but while that case dealt with the entire controversy doctrine, generally, the Court determines that Olds is addressed specifically to procedures and underlying policies relating to party joinder, not claims joinder. The Court finds support for its conclusion in Oliver.

of a discussion of party joinder, not joinder of claims. The Supreme Court explained earlier in its discussion:

> Some contend that the dominant consideration with party joinder should be the freedom of claimants to decide what defendants to join in an action. They theorize that most plaintiffs' attorneys rationally want to join as many parties as possible .... The reality, however, is that some attorneys have elected to conceal ... or withhold ... claims against additional parties .... In that limited context, when no lesser remedy would suffice, a court may resort to preclusion.

150 N.J. at 448-48 (citations omitted).

More importantly, though, the Supreme Court's admonition, like the passages on fairness to the parties and fairness to the system of judicial administration that plaintiff cites from Karpovich v. Barabula, 150 N.J. at 480-93, and Oliver, 152 N.J. at 395-402, fundamentally reaffirms the longstanding principle. that "the polestar of the application of the (entire controversy] rule is judicial fairness." See DiTrolio, 142 N.J. at 272 (cited in Oliver, 152. J. at 395).

As the Supreme Court explained in Oliver: "[T]he boundaries of the entire controversy doctrine are not limitless. It remains an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases." 152 N.J. at 395 (citation omitted). Ultimately holding that the entire controversy doctrine precluded the plaintiff's claims, the Supreme Court explained in Oliver: "The courts have indicated that equitable considerations can relax the application of the [entire controversy] doctrine, but the extent to which the doctrine is relaxed depends on the facts of the case and the policy interests implicated." (Id. at 397).

Plaintiff urges that equitable considerations here make it inappropriate to bar plaintiff's claims under the entire controversy doctrine. Specifically, plaintiff argues that it is unfair to bar its claims since plaintiff was represented by insurance carriers' counsel in the Kent and FSQ litigations where it failed to pursue affirmative claims against the Agusta defendants. Moreover, plaintiff notes that in settling the litigation, both plaintiff and the Agusta defendants signed a release which stated: This Release does not extend to any claim made or related to ... the lawsuit encaptioned Paramount Aviation Corp. v. Gruppo Agusta, et al., Civil Action No. 91-4954(JWB) currently pending before the United States District Court for the District of New Jersey." (Plaintiff's Motion to Vacate Summary judgment at Exh. B).

The equitable concerns that plaintiff raises do not alter the Court's conclusion that plaintiff's claims should be dismissed under the entire controversy doctrine. That "plaintiff was represented by counsel selected by the insurer in the first action" is "a possible equitable consideration." See Oliver, 152 N.J. at 396. However, it is one not particularly favored under New Jersey law. See Prevratil v. Mohr, 145 N.J. 180, 194-96 (1996) (holding no general exception to entire controversy doctrine exists for litigants represented by insurance counsel in initial litigation). As the New Jersey Supreme Court explained in Prevratil:

> For decades, courts have discounted a plaintiff's representation in an earlier action by counsel provided by an insurer. See Schweitzer v. MacPhee, 130 N.J. Super. 123, 127 (App. Div. 1974] (stating that "[t]he mere fact that an insurance carrier ['sl ... counsel defended, in no way demonstrates the inability of plaintiff to comply with the rules of the court"); Burrell [v. Quaranta], 259 N.J. Super. 243, 254 (App. Div. 1992)].

> Although an insurer may select the attorney to represent an insured, that attorney owes his first allegiance to his client in the action, the insured, and bears the responsibility to represent him properly in all respects." Molnar v. Hedden, 260 N.J. Super. 133, 147 ... (App. Div. 1992), rev'd on other grounds, 138 N.J. 96 ... (1994); see also Lieberman v. Employers Ins., 84 N.J. 325, 336 ... (1980) (stating that insurance carrier has fiduciary duty to represent insured); Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 ... (1974) Plainly stated, in any litigation, counsel for an insurer must put the insured's interests ahead of the insurer's. Lieberman, supra, 84 N.J. at 336...

145 N.J. at 194.

Plaintiff correctly points out that the parties agreed that the settlement of the FSQ litigation should not affect this litigation. However, the Court is aware of no such agreement with respect to the earlier Kent litigation. More importantly, the goals of the entire controversy doctrine are both "fairness to the parties and fairness to the system of judicial administration." Karpovich, 150 N.J. at 480. To the extent that preclusion of plaintiff's claims may not be required by the first of these underlying principles, the Court believes it to be mandated by the second. Contrary to plaintiff's arguments, this is not a case like Karpovich where the Supreme Court concluded, on the basis of equitable considerations, that the entire controversy doctrine did not bar claims against a party who had not been joined in an earlier action. In Karpovich, the earlier action had been pending for only seven days before the entry of a consent judgment. The Supreme Court reasoned: "Preclusion of Karpovich's legal malpractice action against defendants

simply does not advance the entire controversy's central role of promoting judicial economy and efficiency." 150 N.J. at 482. Here, in contrast, plaintiff was party to two separate actions arising out of the same circumstances as the claims it asserts here, one (Kent) lasting eight months, and the other (FSQ) lasting for over a year. Under these circumstances, fairness to the system of judicial administration calls for the dismissal of plaintiff's claims.

Although the Court did not discuss equitable considerations at length in its April 4, 1997 opinion, it did not ignore them. It noted, in its recitation of the facts, that the FSQ action was settled in June 1992 with an exchange of mutual releases that specifically excluded the claims in the instant action and the Trump action." (Op., Apr. 4, 1997 at 5). In rejecting plaintiff's argument that the Agusta defendants had waived their entire controversy defense, the Court stated: "Given the lengthy history of litigation concerning the helicopter crash, it could not be unforeseen to the plaintiff that the entire controversy doctrine might be implicated." (Id. at 11). In addition, the Court observed:

> In this case, Paramount deliberately chose to fragment the litigation by bringing certain claims against the Agusta defendants in the Kent action while withholding other claims against them. Those claims were clearly known to Paramount. They were two of the seven claims asserted in the complaint in I while Kent was still pending. Paramount also failed to bring these claims in the FSQ litigation.

(Id. at 14). The Court still considers these to be the fundamental facts that must be taken into account. Notwithstanding subsequent case law, which the Court finds has little if any effect on this action, the Court stands by its

earlier conclusion that the entire controversy doctrine bars plaintiff's claims. Accordingly, the Court will not vacate its April 4, 1997 Order.

CONCLUSION

For the foregoing reasons, plaintiff's motion to vacate the entry of summary judgment in favor of the Agusta defendants dismissing the claims of the plaintiff is denied.

JOHN W. BISSELL
United States District Judge

Dated: June 26, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PARAMOUNT AVIATION COP,

Plaintiff,

V.

Civil Action No. 91-4954

ORDER

GRUPPO AGUSTA; AGUSTA AEROSPACE: CORPORATION; COSTRUZIONE AERONAUTICHE GIOVANNI AGUSTA, S.p.A., and AGUSTA, S.p.A.,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 26th day of June, 1998,

ORDERED that plaintiff's motion to vacate the entry of summary judgment in favor of the Agusta defendants in this Court's Order of April 4, 1997 be, and it hereby is denied.

JOHN W. BISSELL
United States District Judge

Filed May 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-6257

PARAMOUNT AVIATION CORPORATION,
Appellant

v.

GRUPPO AGUSTA; AGUSTA AEROSPACE CORPORATION; COSTRUZIONI AERONAUTICHE GIOVANNI, Augusta, S.P.A.; AUGUSTA, S.P.A.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 91-cv-04954)
District Judge: Honorable John W. Bissell

Argued: March 25, 1999

Before: BECKER, *Chief Judge*, LEWIS and WELLFORD,* *Circuit Judges*.

(Filed May 13, 1999)

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*Honorable Harry Wellford, United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

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OPINION OF THE COURT

BECKER, *Chief Judge.*

New Jersey's entire controversy doctrine is an extremely robust claim preclusion device that requires adversaries to join all possible claims stemming from an event or series of events in one suit. Animated by the laudable goal of easing the burdens of excessive litigation, the doctrine was developed in the domestic context, precluding suits in New Jersey courts based on disputes that were previously the subject of litigation in New Jersey courts. It has attained interjurisdictional proportions, however, and has been used in New Jersey to preclude claims based on a failure to effect joinder in previous litigation in non-New Jersey courts, where such joinder was not required by those courts' own rules. The repercussions of the doctrine have prompted adverse scholarly comment. *See generally Symposium: Entire Controversy Doctrine*, 28 Rutgers L.J. 1 (1996).[1]

This case began with a helicopter crash, though the facts have little bearing on the issue before us. We must decide whether a federal court in New Jersey should, when

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1. Until quite recently the entire controversy doctrine required party as well as claim joinder. The party joinder aspect of the doctrine, the focus of the lion's share of the criticism, has now been eliminated. *See* N.J. R. Civ. Pro. 4:30A. However, the interjurisdictional claim preclusion problem, also the subject of considerable scholarly criticism, remains.

exercising its diversity jurisdiction, apply the entire controversy doctrine to bar the plaintiff from asserting claims against the defendants because they were not asserted in prior litigation involving the instant parties and others in federal courts in Pennsylvania, New York, and New Jersey. We conclude that we should not. Disagreeing with the District Court, which barred the plaintiff's claim, we hold that federal courts should apply the general rule that the preclusive effect of a judgment is determined by the preclusion law of the issuing court—in this case, a federal court. We will, therefore, reverse the District Court's grant of summary judgment to the defendants on the plaintiff's tort claims and remand for further proceedings. We will also uphold the District Court's determination of the amount owed to defendant Agusta Aerospace Corporation ("AAC") on its counterclaims, but we will vacate the judgment on the counterclaims pending disposition of Paramount's tort claims.

I. Facts and Procedural History

On October 10, 1989, an Agusta 109A helicopter crashed in New Jersey, killing the pilot, co-pilot, and three passengers, who were top-echelon employees of the Trump Hotel and Casino enterprises. The helicopter was manufactured by Costruzioni Aeronautiche Giovanni Agusta ("CAGA") and purchased by AAC. CAGA is a subsidiary of Agusta S.p.A. and a part of Gruppo Agusta. AAC is CAGA's wholly-owned U.S. subsidiary. These are the "Agusta defendants." AAC sold the helicopter to Clifton Park Association, which sold it to FSQ Air Charter Corporation ("FSQ"). Paramount Aviation, Inc. ("Paramount") arranged for this sale to FSQ and contracted with FSQ to manage the aircraft and to supply one of the two pilots who operated it.

The first lawsuit arising from the crash was *Kent v. Costruzioni Aeronautiche Giovanni Agusta, Gruppo Agusta, Agusta Aviation Corp., & Paramount Aviation, Inc.* ("*Kent*"), filed in the United States District Court for the Eastern District of Pennsylvania, on March 30, 1990, by the widow and estate of co-pilot Robert Kent. The Agusta defendants filed answers asserting cross-claims against Paramount for contribution and indemnification, and Paramount's answer

included cross-claims against the Agusta defendants for contribution and indemnification, but no affirmative claims. This case settled on November 27, 1990, for $3,150,000, of which the Agusta defendants paid $2,900,000 and Paramount paid $250,000.

Second came *Trump Taj Mahal Assoc., Trump Castle Assoc., Trump Plaza Assoc., & Helicopter Air Services, Inc. v. Costruzioni Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, Agusta Aviation Corp., & Paramount Aviation Corp.* ("*Trump*"), filed in 1990 in the Superior Court of New Jersey and immediately removed to federal court. Prior to serving answers, the defendants filed motions for summary judgment, and the district court dismissed all counts, ruling that the plaintiff-employers were not entitled to recover under any of the theories they had alleged. *See Trump Taj Mahal Assoc. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143 (D.N.J. 1991), *aff'd mem.*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992). Paramount and the Agusta defendants asserted no cross-claims against each other, nor was there occasion for them to do so after the summary judgment motions were granted.

Next came *FSQ Air Charter Corp. v. Costruzioni Aeronautiche Giovanni Agusta, Agusta, Gruppo Agusta, & Agusta Aviation Corp.* ("*FSQ*"), filed in 1991 in the United States District Court for the Eastern District of New York. AAC filed a third-party complaint against Paramount, and Paramount answered without raising affirmative defenses or counterclaims. The parties' insurers defended the action, which was settled in June 1992 with an exchange of mutual releases that specifically excluded the claims in the case before us.

Fourth was *Paramount Aviation Corp. v. Gruppo Agusta, Agusta Aviation Corp., Costruzioni Aeronautiche Giovanni Agusta, & Agusta S.p.A.* ("*PAC I*"), filed in the United States District Court for the District of New Jersey in 1990. That complaint alleged seven counts of tortious behavior, including negligence, willful misconduct, and strict tort liability. Paramount claimed that the crash caused it adverse publicity, public hostility, loss of clients and goodwill, loss of income, and other damages. On August 16,

1990, the complaint was voluntarily dismissed under Federal Rule of Civil Procedure 41, without prejudice, prior to answer. *Kent* was still pending at that point, and *Trump* was on appeal.

Finally, *PAC II*, the instant case, was filed in New Jersey Superior Court in 1991. Alleging the same damages as *PAC I*, plaintiff Paramount stated two counts: (1) negligence, gross negligence, and willful and reckless misconduct; and (2) strict tort liability. Paramount claimed damages as a result of the Agusta defendants' manufacturing and design, which allegedly caused the crash. The case was removed, and the Agusta defendants (except for "Gruppo Agusta," which seems to be an umbrella name without independent corporate existence) filed answers in October 1992, while AAC also stated a counterclaim against Paramount for amounts allegedly owed for another Agusta helicopter and for payments for spare parts, service, and training. Although the complaint contained a certification about *Trump* and *FSQ*, as required by N.J. Rule 4:5-1, the Agusta defendants did not raise the entire controversy doctrine in their answers. The defendants first raised the entire controversy doctrine in February 1996 and filed a summary judgment motion on that ground in February 1997.

The District Court granted summary judgment against Paramount on its claim, reasoning that the claim was barred by the entire controversy doctrine. It then granted summary judgment for AAC on the counterclaim. Paramount appeals.

II. The Entire Controversy Doctrine

A. *Introduction: The District Court's Rationale*

Under the entire controversy doctrine, a party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action. The doctrine has three purposes: (1) complete and final disposition of cases through avoidance of piecemeal decisions; (2) fairness to parties to an action and to others with a material interest in it; and (3) efficiency and avoidance of waste and delay. *See DiTrolio v. Antiles*, 662 A.2d 494, 502 (N.J. 1995). As an

equitable doctrine, its application is flexible, with a case-by-case appreciation for fairness to the parties.

The entire controversy doctrine is an affirmative defense, waived if not pleaded or otherwise timely raised. *See Brown v. Brown*, 506 A.2d 29, 35 (N.J. Super. Ct. App. Div. 1986). Notwithstanding that principle, the District Court held that failure to raise the doctrine in a responsive pleading should be viewed in light of the federal policy of liberally allowing amendments if the issue was raised at a pragmatically sufficient time. *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1374 (3d Cir. 1993). Although the defendants had not formally raised the entire controversy defense until their motion for summary judgment, filed in 1997, the District Court decided that it would have granted leave to amend the pleadings to assert it. *See id.* at 1374; *see also Burrell v. Quaranta*, 612 A.2d 379 (N.J. Super. Ct. App. Div. 1992) (entire controversy defense was not foreclosed where the trial judge would have granted leave to amend the pleading if asked).

The District Court further determined that Paramount was not prejudiced by this decision. The court reasoned that, given the lengthy history of litigation over the crash, the application of the doctrine could not have been unforeseen. Moreover, the court concluded that the long delay between the filing of the complaint and the motion for summary judgment was not prejudicial because it was largely the result of Paramount's failure to prosecute the action vigorously.[2] The court further found that the *Kent* litigation offered Paramount an opportunity to bring its claim against the Agusta defendants; Paramount had brought cross-claims for contribution and indemnification in that case.

Paramount argued that the doctrine should not apply when all the previous actions, as well as the instant one, were federal, but the District Court reasoned that the doctrine had routinely been applied in federal court. *See, e.g., Petrocelli v. Daniel Woodhead Co.*, 993 F.2d 27 (3d Cir.

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2. The parties strenuously dispute the causes and effects of the delay, but, as we need not reach the issue, we will not address it in greater detail.

1993). Paramount maintained that the doctrine was procedural. The court responded that it was not "procedural" simply because it was codified in a rule of procedure; as a creature of state common law, the entire controversy doctrine was to be applied federally under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Paramount urges that the District Court abused its discretion in its application of the equitable considerations behind the entire controversy doctrine. The District Court, of course, has great discretion in matters of this sort. However, we need not reach the issue, because we find that the entire controversy doctrine is not the right preclusion doctrine for a federal court to apply when prior judgments were not entered by the courts of New Jersey.

B. *Foreign Application of the Entire Controversy Doctrine*

In order to decide whether to apply New Jersey law or federal law, we must follow the rules laid down in *Erie* and its progeny. We are required to weigh the significance and substantive character of the state preclusion rule, and the likelihood that application of the federal rule would produce forum-shopping by parties, against the importance of the federal interests underlying the federal rule. *See Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535-40 (1958). If a rule is outcome-determinative, so that applying the federal rule would change the result of a case filed in federal court from the result in an identical state court case, it is likely to affect parties' decisions where to litigate, and applying the state rule is generally appropriate. On the other side, a strong federal policy embodied in constitutional principles or federal law justifies the application of a federal rule. In this case, the relevant federal interests are embodied in Federal Rule of Civil Procedure 13, which establishes federal claim joinder rules, and in federal principles of res judicata. We conclude that New Jersey's interest in the entire controversy doctrine, while weighty, does not require us to adopt it in order to decide the preclusive effects of non-New Jersey cases.

1. The Parties' Contentions

Paramount notes that none of the lawsuits filed in the aftermath of the accident was litigated in New Jersey state court (three were brought in federal court and two were removed).[3] It argues that the New Jersey Rules of Court containing the entire controversy doctrine are procedural and therefore should not be applied in federal court. Paramount also submits that New Jersey's interest in preserving the resources of its courts is minimal, if not absent, here, where all of the prior cases were litigated outside of the New Jersey courts. *See Henkels & McCoy, Inc. v. Adochio*, 906 F. Supp. 244, 249 (E.D. Pa. 1995) (declining to apply the doctrine where both the previous case and the instant case were in the Eastern District of Pennsylvania).

Paramount further contends that, when a prior decision's preclusive effect is examined, it is the prior jurisdiction's preclusion law that should generally be applied. *See* Restatement (Second) of Judgments § 87 (1982). Paramount reasons that federal preclusion law should apply to determine the preclusive effects of federal diversity judgments. In the absence of a prior New Jersey judgment on the merits, Paramount maintains, we have no reason to apply New Jersey's supercharged preclusion doctrine.

The defendants respond that the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), requires a federal court hearing a New Jersey tort claim to be bound by New Jersey

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3. Paramount submits, and the Agusta defendants do not challenge, that the fact that actions were originally commenced in state court is irrelevant. Once removed, jurisdiction in the District Court is original and federal procedure applies. Moreover, the state courts have expended negligible resources on the removed case; New Jersey courts do not apply the doctrine when a prior case was pending for only a few days and no notable activity took place. *Cf. Hulmes v. Honda Motor Co.*, 924 F. Supp. 673 (D.N.J. 1996) (declining to apply the doctrine when the first action was only pending in New Jersey state court for one week before its voluntary dismissal); *Karpovich v. Barbarula*, 696 A.2d 659 (N.J. 1997) (holding that a settlement did not require application of the doctrine where there were only seven days between the state court filing and the entry of a consent judgment and virtually no judicial resources were used).

substantive law, of which the entire controversy doctrine is a part. *See Rycoline Prods., Inc. v. C&W Unltd.*, 109 F.3d 883, 887 (3d Cir. 1997). We note some initial discomfort with this description, as we believe that the entire controversy doctrine, like all preclusion doctrine, should generally be characterized as procedural. We take up *Rycoline* and the substance/procedure divide *infra*, noting here only that the Supreme Court has long instructed us that the substance/procedure line is not dispositive when federal courts must choose which sovereign's law to apply. *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

The defendants also point out that federal courts have occasionally applied the entire controversy doctrine to determine the effects of non-New Jersey judgments, but the parties in prior decisions have not contested the application of the doctrine.[4] Nor have we resolved the broader issue of whether federal or state res judicata law governs successive diversity actions. *See Venuto v. Witco Corp.*, 117 F.3d 754, 758 & n.7 (3d Cir. 1997). We have, however, decided that federal law governs the preclusive effect of a prior diversity judgment on a subsequent federal question case. *See In re Kaplan*, 143 F.3d 807, 814-15 (3d Cir. 1998). We noted in *Kaplan* that the Supreme Court used federal law to determine the preclusive effect of a prior diversity judgment in *Heiser v. Woodruff*, 327 U.S. 726 (1946). Though the issue was not then before us, we also suggested that the rationale for applying federal preclusion law to determine

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4. The entire controversy doctrine has indeed been invoked when the previous suit was in another state or in a federal court. *Melikian v. Corradetti*, 791 F.2d 274 (3d Cir. 1986), applied the entire controversy doctrine, though its only preclusive effect was on a corporation that may not even have been a party to the second lawsuit. *See id.* at 280 & n.3. *Melikian* assumed that the doctrine applied to successive diversity cases in New Jersey and did not address the choice of law question. Thus, it does not control our decision today. Similarly, in *Itzkoff v. F&G Realty, Corp.*, 890 F. Supp. 351 (D.N.J. 1995), the first action was in New York state court and the second in New Jersey federal court. The parties and the court assumed that the entire controversy doctrine governed. *See Itzkoff*, 890 F. Supp. at 355. The court found that New Jersey (state) courts would apply the doctrine to foreign proceedings "where fairness so required." *Id.* at 356. The parties did not broach the specific issue of a *federal* court's application of the doctrine.

the effects of a prior diversity judgment on a later federal question case was quite similar to the rationale for doing so in a later diversity case. *See Kaplan*, 143 F.3d at 815 n.15.

2. Relevant Case Law

We find two New Jersey decisions particularly helpful in elucidating New Jersey's view of the entire controversy doctrine. In *Watkins v. Resorts International Hotel & Casino, Inc.*, 591 A.2d 592 (N.J. 1991), the New Jersey Supreme Court acknowledged the general rule that the preclusive effect of a judgment is determined by the law of the jurisdiction that rendered it, as a logical consequence of the procedures of the issuing court. *See id.* at 598. This rule affects the application of the entire controversy doctrine in New Jersey state court. Only in "limited circumstances" may the doctrine preclude an action not otherwise precluded by the res judicata effects of a federal decision. *See id.* at 598-99. The court held that it was essential to consider the federal law of claim preclusion in determining whether to apply the entire controversy doctrine, as an equitable matter, in state court cases. *See id.* at 599. *Watkins* thus suggests that New Jersey recognizes the interests of other jurisdictions that have differing preclusion doctrines.

In *Mortgageling Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536 (N.J. 1995), the New Jersey Supreme Court applied the entire controversy doctrine to a plaintiff who had previously sued on the same underlying facts in the federal District Court for the Eastern District of Pennsylvania. Almost a year earlier, a mortgage lender had brought an action in the latter court against Pennsylvania-based companies and individuals who were allegedly the central figures in a fraudulent scheme involving mortgage financing, and the Federal Home Loan Mortgage Corporation ("Fannie Mae") had intervened as a plaintiff. The second case was brought in New Jersey state court by the lender and Fannie Mae against New Jersey-based companies and individuals who participated in the same mortgage transactions and who were allegedly accessories in the same scheme.

Mortgageling stated decisively that the entire controversy doctrine is procedural, and that it was formulated specifically to preserve the resources of *New Jersey* courts.[5] The Court held that the doctrine bars suits in New Jersey against parties who could have been joined in an earlier suit in another state or in federal court. The result was binding only in New Jersey, however; other jurisdictions could permit litigation against earlier-omitted defendants despite a New Jersey decision dismissing an action on entire controversy grounds. The decision thus attempted to cabin the effect of the doctrine outside of New Jersey courts:

> We hold that when a party deliberately chooses to fragment litigation by suing certain parties in another jurisdiction and withholds claims against other parties, a New Jersey court need not later entertain the claims against the omitted parties if jurisdiction was available in the first forum. In doing so we do not export our entire controversy doctrine to other jurisdictions, but merely hold that our notions of procedural fairness do not permit the claims that could have been brought elsewhere to be brought in New Jersey. This ruling presupposes that when the procedural rules of foreign jurisdictions permit the omitted claims to be brought later, the foreign jurisdiction is free to entertain such claims. Just as we do not seek to export our procedural requirements of party joinder, we do not seek to export any preclusive effect to our rules of party joinder.
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5. *Guaranty Trust Co.* announced that "[i]t is . . . immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific [*Erie*] issue before us." *Guaranty Trust Co.*, 326 U.S. at 109. *Mortgageling*, however, is intimately related to the choice of law issue, and thus we do not believe that Justice Frankfurter's conclusion precludes us from considering that case. More importantly, we believe that *Watkins* and *Mortgageling* provide insight into the scope of New Jersey's interest in its doctrine, an issue that is distinct from the doctrine's location on the substance/procedure line.

> One of the underpinnings of the entire controversy doctrine, in addition to fairness to the parties, is fairness to the system of judicial administration. "Judicial economy and efficiency—the avoidance of waste and delay—remain constants in the application of the entire controversy doctrine. Fragmented and multiple litigation takes its toll on not only the parties but the judicial institution and the public." Each jurisdiction is free to assess the importance of such values. . . .
>
> If Pennsylvania courts do not have a comparable party-joinder rule, principles of comity suggest that New Jersey should not seek to export its entire controversy doctrine to regulate the conduct of attorneys in that jurisdiction. In other words, attorneys conducting litigation in Pennsylvania courts should not have to accommodate their practices to the demands of New Jersey courts. A corollary of that proposition, however, is that New Jersey courts need not necessarily grant relief when parties deliberately refrain from seeking relief in other jurisdictions when doing so would have been much fairer to all parties involved. There is a delicate balance between the interests of the two jurisdictions that must accommodate the interests of justice. . . .
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> . . . .
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> Maintaining a cohesive federal system (and the Full Faith and Credit Clause melds the state courts into that system) does not require that the other parts of the federal system honor our entire controversy doctrine.

Mortgageling, 662 A.2d at 537, 540, 541, 542 (citations omitted).

The *Mortgageling* court mentioned that "the federal courts are considered those of another sovereign," *id.* at 541, and suggested that the application of the doctrine in a diversity action in New Jersey federal court might be governed by choice of law principles, indicating that the court did not necessarily expect federal courts in New Jersey to apply the doctrine exactly as the state courts would. *See id.* at 542.

Thus, while *Mortgageling* continued to embrace an expansive view of the doctrine within New Jersey state courts, it heralded an awareness of the doctrine's limits when interjurisdictional problems were involved. While New Jersey cannot, of course, control our understanding of the relevant federal law, we consider *Watkins* and *Mortgageling* useful explications of the justifications for the doctrine, and hence of New Jersey's interests. We turn, therefore, to an assesment of the relevant state and federal interests.

3. Analysis of the Relevant State and Federal Interests

a. *The Import of* Rycoline

Rycoline held that a federal court deciding a federal cause of action is bound by the entire controversy doctrine when determining the effect of a prior New Jersey state court judgment. The court characterized the doctrine as "an aspect of the substantive law of New Jersey, by virtue of the Full Faith and Credit Act." *Rycoline*, 109 F.3d at 887. Thus, the plaintiffs, who had filed a previous suit in New Jersey state court, were subject to the rigors of the entire controversy doctrine when they filed a second suit in New Jersey federal court, although they were able to proceed because we decided that New Jersey would not apply the doctrine while the first suit was still pending.

The defendants claim that the just-quoted phrase from *Rycoline* obligates us to apply the entire controversy doctrine as part of New Jersey substantive law under *Erie*. We believe that the question is slightly more complex. The Full Faith and Credit Act provides that the judicial proceedings of a state court shall have the same full faith and credit within every court in the United States as they have by law or usage in the courts of the issuing state. Thus, federal courts must give the same preclusive effect to a state court judgment as another court of that state would, unless to do so would violate due process. *See Rycoline*, 109 F.3d at 887. In this case, there are only federal judgments, and the Full Faith and Credit Act is not by its terms applicable. It is usually thought that federal judgments receive full faith and credit by virtue of federal common law. *See, e.g.*, Ronan Degnan, *Federalized Res*

Judicata, 85 Yale L.J. 741, 744-50 (1976) (discussing the development of the rule requiring respect for federal judgments); *cf. Embry v. Palmer*, 107 U.S. 3, 10 (1883) ("[T]he judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and whereever [sic] sought to be enforced.").

To the extent that *Rycoline* labelled the entire controversy doctrine "substantive" for purposes of the Full Faith and Credit Act, we conclude that it meant only that New Jersey law governed the preclusive effects of an earlier New Jersey state court judgment. This is exactly what the Act requires. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794 (1986). We decline to read one phrase in a decision that depended on completely different issues as determining the result in this case. Rather, our interpretation of *Rycoline* renders it consistent with the long line of New Jersey cases labelling the entire controversy doctrine "procedural." *See, e.g., Oliver v. Ambrose*, 705 A.2d 742, 746 (N.J. 1998); *Harley Davidson Motor Co. v. Advance Die Casting, Inc.*, 696 A.2d 666, 668 (N.J. 1997); *Mortgageling; Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 523 A.2d 131, 135 (N.J. 1987). At all events, the substance/procedure divide is not necessarily the controlling factor in determining when a federal court must apply state law. *See Guaranty Trust Co.*, 326 U.S. at 109-10.

Under *Mortgageling*, a dismissal on entire controversy grounds is not a dismissal on the merits; this rule helps to ensure that the doctrine will not have untoward extraterritorial effects.[6] However, New Jersey law still

6. The characterization of an entire controversy-based dismissal as one not on the merits only matters when the prior decision to which New Jersey applies the doctrine is not handed down by a New Jersey state court. When the first decision issues from a New Jersey court, that case carries its own preclusive effect, deserving of full respect in the courts of other jurisdictions. If there is a second New Jersey case that is dismissed on entire controversy grounds, and then a third federal case, we might also give the second New Jersey case preclusive effect on the issue of the

determines the preclusive effects of a prior New Jersey state court judgment on the merits, as in *Rycoline*.

b. New Jersey's Interests and the Risks of Forum-Shopping

New Jersey's main justification for the doctrine, its interest in preserving its judicial resources, is minimized when none of the prior litigation took place in New Jersey state courts. *See* Rochelle Cooper Dreyfuss & Linda J. Silberman, *Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 Rutgers L.J. 123, 156 (1996). New Jersey state courts still apply the doctrine in such cases, which conserves some of New Jersey's judicial resources by precluding subsequent litigation in New Jersey. By contrast, when both prior and subsequent litigation takes place outside the New Jersey state courts, it is hard to see any New Jersey resource interest whatsoever, except inasmuch as the size of the federal docket indirectly affects the state courts.

The risk of unfair surprise is also heightened where the initial litigation did not take place in New Jersey; it may be difficult for responsible lawyers to predict that litigation in New York or California will close the New Jersey federal courts to future claims. *See id.* at 169; *cf. Electro-Miniatures Corp. v. Wendon Co.*, 889 F.2d 41, 45 & n.6 (3d Cir. 1989) (expressing the concern that, if the entire controversy doctrine were applied to out-of-state judgments in New Jersey federal court, other jurisdictions would be adversely affected by the need to tailor litigation to avoid preclusion in New Jersey). *But see* Perry Dane, *Dignity and Glorious Chaos: A Comment on the Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 Rutgers L.J. 173 (1996) (arguing that the problems with the doctrine[4] are overstated). Given New Jersey's recognition, in *Watkins* and

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application of the entire controversy doctrine to the facts, *see* 18 Wright et al., *Federal Practice & Procedure* § 4418, at 171 (1981) (discussing the preclusive effects of determinations that do not go to the merits), but we need not delve further into these murky preclusion waters to decide the case before us.

Mortgageling, that other jurisdictions have significantly different preclusion doctrines and a strong interest in giving effect to those doctrines, we do not believe that a decision requiring federal courts to apply federal preclusion law would depreciate New Jersey law.

Some commentators have argued that *Mortgageling* was wrongly decided and that the Full Faith and Credit Act does not give New Jersey the freedom to give other courts' decisions greater preclusive effect than those courts would allow. *See* Stephen B. Burbank, *Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine*, 28 Rutgers L.J. 87 (1996). Professor Burbank argues that *Mortgageling* works against the compelling interest in national unity by requiring litigants in other states to consider the preclusive effects of their cases on future cases in New Jersey, regardless of the preclusion law of the state in which they file complaints. He concludes that, regardless of New Jersey state court practice, federal courts in New Jersey should apply standard preclusion law, rather than the entire controversy doctrine, to the judgments of non-New Jersey courts. *See* Burbank, *supra*, at 100-01; *see also* Dreyfuss & Silberman, *supra*, at 157-58.

Professor Burbank further argues that, when a federal court in New Jersey tries to resolve this conundrum, it should apply the Full Faith and Credit Act rather than *Erie* balancing. Judicial balancing would be unnecessary, because Congress has explicitly instructed courts how to treat the judgments of state courts. *See* Burbank, *supra*, at 103 n.82. Thus, if the previous litigation involved in this case had taken place in a state court, we would, as a matter of course, give it the preclusive effect it would have in that state's courts.

Though we find this argument persuasive, it does not dispose of this case, because the Full Faith and Credit Act does not by its terms apply here. When the prior decision is a federal decision, the Act applies only by analogy. And in that case, it is important to look to *Erie* principles to decide which sovereign's law to apply. The Full Faith and Credit Act has an important implication, however: If the Act instructs New Jersey federal courts how to determine the

preclusive effect of state decisions, there is a compelling argument for treating federal cases similarly. There is no good reason to apply New Jersey entire controversy law to determine the preclusive effects of a federal diversity case from Pennsylvania when the preclusive effects of the same case would have been governed by the law of the issuing court if it had been litigated in Pennsylvania state court. To make different rules for the two types of cases would be absurd, and would only move the potential forum-shopping problem back one level further, to the initial non-New Jersey litigation.

We note another factor that diminishes the force of the *Erie* concerns that generally lead to application of state law. Our *Erie* jurisprudence counsels us to avoid situations in which parties who can invoke federal jurisdiction are treated differently from those who cannot. Because we are considering a preclusion doctrine, the question is whether parties who can invoke federal jurisdiction will be able to litigate claims that will be precluded for parties who cannot. The risk of inequitable preclusion is minimal, for the following reason: This situation arises only when there has been previous litigation outside the New Jersey state courts. However, the entire controversy doctrine would only bar a subsequent New Jersey suit if the first forum would have had jurisdiction over the claims raised in that subsequent suit. It therefore follows that there was an alternate non-New Jersey forum for the relevant claims, although in some cases that forum would be another state court. The relevant point is that no plaintiff in this situation will find itself entirely unable to litigate its claims; even if it is not able to take advantage of federal jurisdiction, it will have another state in which to bring its claims.[7]

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7. It is possible, of course, that a party who has already participated in a foreign lawsuit will mistakenly file a second suit in New Jersey state court and will lose on entire controversy grounds after the statute of limitations for filing a claim elsewhere has run, although it is not entirely clear that a plaintiff in such a situation would be subject to the doctrine. *See Erenberg v. Cordero*, 683 A.2d 567, 574 (N.J. Super Ct. App. Div. 1996) (Stern, J., concurring) (stating that the doctrine should only be applied to the judgments of foreign courts if the plaintiff's claim is actually capable of being litigated in some non-New Jersey court). After

Any resulting disparity is no more than the disparity created by the very existence of diversity jurisdiction, which allows some parties the option of going to federal court whereas others with identical causes of action cannot.[8] While a decision to apply federal preclusion law would be outcome-determinative in this case, therefore, it would not ex ante cut off or extend any substantive rights that a plaintiff would have in the absence of a New Jersey federal forum, and would be unlikely to encourage significant forum-shopping.[9]

Our analysis can be summarized as follows: New Jersey has no significant interest in controlling the dockets of other court systems. Moreover, application of a federal rule in the rather unusual circumstances here would be unlikely to create unfairness by causing different results in

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our decision, a plaintiff who files in New Jersey federal court will not be "mistaken," and will not face this dilemma. Thus, there is a possibility that results will differ in some cases. However, *Erie* rules were designed to avoid conscious forum-shopping, not to increase the risks of carelessness or unfamiliarity with state law.

8. The decision to apply federal preclusion law affects forum choice in this sense only: A well-informed plaintiff might be able to split claims between some foreign court and a New Jersey federal court that, if the federal court applied the entire controversy doctrine, it would otherwise consolidate in the foreign court. But this is not the forum-shopping between state and federal court that *Erie* decried; it is claim-splitting, which presents different issues. As long as the plaintiff adheres to the other jurisdictions' rules of joinder, we do not think that any inequity has occurred. It is theoretically possible that variations between New Jersey choice-of-law doctrines and the choice-of-law doctrines of other jurisdictions might change the outcome on such a split claim, but we doubt that parties will base their forum choices on such exotic possibilities.

9. Relatedly, the forum-shopping concern is diminished simply because successive litigation is less common than litigation in the first instance; there are many factors that go into a decision to file a second lawsuit, and we doubt that a decision to apply federal preclusion law will substantially alter the relevant incentives. In this case, Paramount was not even the initial plaintiff in the pre-*PAC* lawsuits; in a real sense, Paramount had very little choice over those fora, even though it filed counterclaims and cross-claims.

federal court than in state court or to cause significant forum-shopping. The issues of outcome-determinativeness and a consequent incentive to forum-shop are not free from doubt, however. Therefore, it is important for us to determine whether there is a significant federal interest counseling application of the federal rule. *See Fauber v. KEM Transp. & Equip. Co.*, 876 F.2d 327, 331 (3d Cir. 1989). It is to this question that we now turn.

c. The Federal Interest

Federal courts have a significant interest in determining the preclusive effects of federal judgments. *See Kaplan*, 143 F.3d at 815 n.15 (citing cases). *Kaplan* applied federal law to determine the preclusive effects of a diversity judgment on a subsequent federal question case. We believe that its logic is equally applicable here, when successive diversity cases are at issue. The source of federal jurisdiction over the second case should not affect our analysis, because we are concerned with the preclusive effect of the *first*. As the Second Circuit has put it:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. . . . It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity.

Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962). We agree.

Paramount persuasively argues that we should apply the general federal rule that the preclusive effects of prior cases are determined by the law of the prior forum. Applying the federal rule would also give effect to the joinder rules of the Federal Rules of Civil Procedure, which define the claims that parties must join if they are not to be later barred. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965) (the strong federal policies embodied in the Federal Rules of Civil Procedure justify a refusal to apply an outcome-determinative state procedural rule); *Byrd* (outcome-determinative state procedural rules do not need to be applied when they are

not an integral part of the underlying substantive right and there is a strong countervailing federal policy, such as the policy against disrupting the allocation of power between judge and jury in federal court). Paramount draws further support from the scholarly opinion in *Fioriglio v. City of Atlantic City*, 963 F. Supp. 415 (D.N.J. 1997), which engaged in a calculus similar to ours; Judge Irenas concluded, as we do, that federal joinder and preclusion rules embody an important federal policy that weighs heavily against applying the entire controversy doctrine in these circumstances. *See id.* at 424.

d. Summary and Conclusion

We conclude that respecting courts' power to determine the preclusive effects of their own rulings is a significant federal interest. In particular, the claim joinder provisions of the Federal Rules of Civil Procedure express a federal policy about what claims must be joined to avoid later preclusion. Applying New Jersey preclusion law to determine the preclusive effects of federal cases would frustrate the policy embodied in the Rules, and we decline to do so. Instead we will follow the federal rule that the law of the issuing court—here, federal law—determines the preclusive effects of a prior judgment.[10]

In reaching this result, clearly foreshadowed by *Kaplan*, we follow the majority of circuits to confront the issue of the law to be applied in successive diversity cases. *See, e.g., J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213-14 (6th Cir. 1996); *Havoco, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307-08 (7th Cir. 1995); *Johnson v. SCA Disposal Servs.*, 931 F.2d 970, 974 (1st Cir. 1991); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715-18 (5th Cir. 1975); *Kern*, 303 F.2d at 340 (Second Circuit). *But see Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th

10. We need not resolve here whether particular aspects of preclusion, such as privity, are "substantive" and are governed by state law. *Cf. Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962 n.2 (3d Cir. 1991).

Cir. 1994) (applying state law); *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994) (same).

Since we have decided that federal law, rather than the entire controversy doctrine, applies, the obvious question is: What is the federal law? However, the Agusta defendants have not argued, either in the District Court or this court, that federal preclusion principles bar Paramount's suit. We thus deem a possible res judicata argument waived. *See Security Servs., Inc. v. K Mart Corp.*, 996 F.2d 1516, 1519 (3d Cir. 1993); *Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283, 1298 (3d Cir. 1991).[11]

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11. We doubt that such a claim would be meritorious in any event. The preclusion inquiry in this case is essentially identical to the question whether Paramount's tort claims were compulsory in any of the earlier lawsuits. *See Publicis Communication v. True North Communications Inc.*, 132 F.3d 363, 365 (7th Cir. 1997). There is no compulsory cross-claim rule in the federal system, *see Wolfe v. Safecard Servs.*, 873 F. Supp. 648, 649 (S.D. Fla. 1995), and therefore the *Trump* suit clearly does not preclude this suit.

The *Kent* suit raises a somewhat trickier issue, because Paramount and the Agusta defendants filed cross-claims for contribution and indemnification against one another in that case. Arguably, the filing of a cross-claim makes parties "opposing parties" within the meaning of Federal Rule of Civil Procedure 13. *See Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62, 66 (3d Cir. 1971) (dicta). A conversion into "opposing party" status would imply that, although cross-claims are never compulsory in themselves, the filing of one cross-claim would trigger duties on both sides to file all claims that were compulsory under Rule 13(a). However, we suspect that a compulsory cross-claim rule would be limited to situations in which the initial cross-claim included a substantive claim, as opposed to claims for contribution and indemnity, in order to avoid needless complication of litigation. *See Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980); *Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Hawai'i, L.P.*, 158 F.R.D. 656, 660 (D. Haw. 1994) (cited in 6 Wright et al., *Federal Practice & Procedure* § 1404, at 2 (Supp. 1997), for the proposition that filing one cross-claim turns coparties into opposing parties). *But see Kane v. Magna Mixer Co.*, 71 F.3d 555, 562 (6th Cir. 1995) (holding that indemnity claims trigger the compulsory cross-claim rule). Thus, the cross-claims for contribution and indemnity in *Kent* would not likely bar the present litigation.

FSQ, in which AAC filed a third-party complaint against Paramount, raises the specter of an omitted compulsory counterclaim that would

We will therefore vacate the judgment in favor of the defendants and remand to the District Court for further proceedings on Paramount's tort claims.

III. The Counterclaims

In its counterclaims, AAC alleged that it was entitled to payments for the lease of one helicopter and for goods and services provided for three other helicopters. It presented three counterclaims, but the third counterclaim in actuality duplicated the claims of the first two, and the District Court granted summary judgment on those two. In order to prevail on summary judgment, a party stating an affirmative claim must come forward with evidence entitling it to a directed verdict. *See International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir. 1991).

The first counterclaim was for $34,629 plus 1.5% interest per month for breach of a helicopter lease contract entered into on March 20, 1987, and expiring November 15, 1989. The second was for $28,159.98 plus 1.5% interest per month for breach of a contract for the sale and supply of spare parts, services, and training related to three of Paramount's helicopters. The third was for an account stated between AAC and Paramount for $62,788.98 for unpaid lease payments and goods, services, and training, plus 1.5% interest per month after September 1989. The contracts were governed by Pennsylvania law.

AAC proffered the relevant lease agreements and invoices, and an affidavit from its Vice President of Finance and Administration, Vincent Genovese, detailing the amounts

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preclude the present suit. However, we are inclined to think that the releases in *FSQ*, which specifically excluded the *PAC* claims, would operate as a waiver of a preclusion defense. *See Publicis*, 132 F.3d at 366; *cf. Bristol Farmers Market & Auction Co. v. Arlen Realty & Devel. Corp.*, 589 F.2d 1214, 1220-21 (3d Cir. 1978) (parties are not precluded from arbitrating claims that would normally be precluded by the compulsory counterclaim rule if they have agreed to arbitrate those claims); Restatement (Second) of Judgments § 26(1)(a) (providing that parties may agree "in terms or in effect" that a plaintiff may split a claim).

not paid and calculating the interest due thereunder. For its account stated claim, AAC submitted a November 14, 1991, letter from Genovese to Al Bartone, Paramount's president. The letter states:

> This letter shall formalize our agreement in which you have agreed to make monthly payments of $3,000 commencing 1/1/1992 in order to satisfy the debts owed by Paramount to Agusta Aerospace. As of October 31, 1991, the outstanding balance was $88,829.02 which includes interest of $10,361.00. Interest will continue to accrue on the principal amount of the debt until it is paid in full.
>
> Please indicate your agreement with these terms by signing below.

Bartone signed "Agreed" on November 14, 1991. Paramount states that, in addition to this letter, it entered into a "short-term lease agreement" with AAC on the same day. This agreement gave Paramount the right to lease a newer model 109 helicopter from AAC for an hourly rental fee, and Paramount agreed to attempt to sell this aircraft on commission. Paramount contends that this new lease agreement was part of a package deal that also included the agreement relating to past debts quoted above. However, Paramount does not challenge AAC's basic underlying evidence regarding the existence and terms of the 1987 helicopter lease and the service contract.

Paramount defended against the account stated claim by noting that, although the November 14 Genovese/Bartone letter was signed two days after AAC filed counterclaims, the amount in the letter differs from that in the counterclaim, and the letter makes no mention of those counterclaims. Paramount also argued that AAC did not submit proof that it demanded payment before filing the counterclaims. The District Court found Paramount's arguments persuasive to defeat the account stated claim, but ultimately irrelevant, because the relief sought on the account stated claim was exactly the same relief sought on the two breach of contract claims, on which it granted summary judgment to AAC. We agree.

In fact, Paramount did not effectively challenge AAC's entitlement to the amounts asserted in the counterclaims, except to offer a number of defenses: an argument that the November 14 letter constituted an accord and satisfaction or a novation; a claim that AAC had waived its counterclaims; and various equitable defenses. It also asserted a set-off. The District Court rejected these defenses. We take them up in turn, except for the equitable defenses, which we dispose of summarily in the margin.[12]

A. *Accord and Satisfaction or Novation*

Paramount contends that there was an accord and satisfaction or a novation, based on the November 14 letter. An accord and satisfaction is a substitute contract for settlement of a debt by some alternative other than full payment. *See Occidental Chem. Corp. v. Environmental Liners, Inc.*, 859 F. Supp. 791 (E.D. Pa. 1994). The consideration is the resolution of a disputed claim. The District Court found that the November 14 letter might be evidence of an accord, but that there was no evidence that Paramount had made payment according to the agreement, which is required for satisfaction. *See Beechwood Commons Condominium Ass'n v. Beechwood Commons Assocs., Ltd.*, 580 A.2d 1, 5 n.2 (Pa. Super. Ct. 1990). We agree. When an accord is breached, the non-defaulting party can enforce, at its option, the underlying agreement or the accord. *See*

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12. Paramount asserted a hodgepodge of equitable defenses, which the court held inapplicable to AAC's counterclaims. Estoppel, for example, requires material misrepresentation, reasonable reliance, and resulting damage. *See Greenberg v. Tomlin*, 816 F. Supp. 1039, 1055 (E.D. Pa. 1993). The District Court found no evidence of misrepresentation. As for unclean hands, that defense applies when the party seeking relief is guilty of fraud, unconscionable conduct, or bad faith directly related to the matter at issue that injures the other party and affects the balance of equities. *See Equibank v. Adle, Inc.*, 595 A.2d 1284, 1287 (Pa. Super. Ct. 1991). However, Paramount does not allege that the invoices that are the subject of the counterclaim deal with services that were negligently provided, nor would a vibration problem in one helicopter be enough to establish the defense. Furthermore, the court found no evidence of unconscionability or that the contract was against public policy. The equitable defenses are essentially conclusory and we think that the District Court was correct to reject them.

Nowicki Constr. Co. v. Panar Corp., 492 A.2d 36, 40 (Pa. Super. Ct. 1985). Thus, without any evidence of satisfaction (and there was none), there was not a scintilla of evidence supporting this defense. We find no error in the District Court's reasoning on this point.

Paramount then argued that the letter was a novation, extinguishing the former obligation by another new promise. In a novation, the new promise itself satisfies the preexisting claims, whereas in an accord it is the performance of the new promise that does so. *See id.* A novation bars revival of the preexisting duty. *See Beechwood*, 580 A.2d at 5. The essential difference between an accord and a novation is the parties' intent. *See Nowicki*, 492 A.2d at 40. The party asserting a novation has the burden of proof. *See Buttonwood Farms, Inc. v. Carson*, 478 A.2d 484, 486 (Pa. Super. Ct. 1984). The District Court found that there was no evidence of any kind that the parties intended to extinguish their obligations under the original lease and contract.

Paramount claims that a jury could find the letter to be a novation, especially when viewed in context with the lease agreement for the new model 109A helicopter executed the same day and given that the amount in the letter differed from that stated in the counterclaim. The existence of a substituted contract is generally for the jury. *See Proie Bros., Inc. v. Proie*, 301 F. Supp. 680, 682 (W.D. Pa. 1968), *aff'd*, 414 F.2d 1365 (3d Cir. 1969). However, we do not think that a reasonable jury could find that the November 14 lease agreement or the counterclaim evidence an intent to enter into a novation. There is simply no suggestion in the record that either of the parties considered the November 14 letter to be a new contract. On its face it is no more than an agreement to pay amounts owed on a certain schedule, and Paramount has offered no other evidence of the parties' intent.[13]

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13. If there was a new contract, Paramount further argues, the statute of limitations has run on it, because the counterclaim was never amended to include the new contract. Because we conclude that there was no new contract, we need not resolve this issue.

B. *Waiver*

Paramount also argues that AAC waived its claim by failing to send dunning notices or to take any steps to collect the debts that were due and owing until Paramount sued. Under Pennsylvania law, waiver of legal rights can arise by clear, unequivocal, and decisive action by a party with knowledge of such rights and evident purpose to surrender them. Waiver can be express or implied from conduct in situations that would support equitable estoppel. The party claiming implied waiver must show that it was misled and prejudiced by the other party's conduct. *See Prousi v. Cruisers Div. of KCS Int'l, Inc.*, 975 F. Supp. 768, 771-72 (E.D. Pa. 1997). Under these requirements, the court held, Paramount could not prove waiver. Even assuming that AAC made no attempt to collect on its debts until sued, Paramount was neither misled nor prejudiced. Moreover, failure to demand payment is simply not a clear, unequivocal, and decisive action. As long as the claim was asserted within the statute of limitations, as it was, Paramount had no reasonable expectation that it would be free from the counterclaim.

C. *Disputes as to Amount*

Paramount also makes several claims about the amount due. First, it argues that the award of 1.5% interest on the goods and services contract was inappropriate, because only the helicopter lease agreement provided for interest, and because many of the invoices for goods and services were issued after September 1989, while interest was calculated on the entire amount in controversy starting from September 1989. *See* App. at 640. However, as the District Court observed, Paramount never attempted to rebut AAC's calculation, expressed in the affidavit of its Vice President, Mr. Genovese. We will not allow it to do so on appeal.

Second, Paramount contends that AAC sought compensation for goods and services with respect to a helicopter numbered 7341, which Paramount never owned or operated. However, Paramount never submitted evidence to the District Court to counter AAC's affidavit. Although Paramount denied knowledge or information about the

helicopter in its responses to requests for admission, its general denial is insufficient to create a genuine issue of fact. *See United States v. Bottenfield*, 442 F.2d 1007, 1008 (3d Cir. 1971).

Paramount finally argues that there was a difference between the amount claimed in the counterclaim ($62,788.98 without interest) and the amount stated in the November 14 letter ($78,468.02 without interest), despite the fact that the counterclaim was filed two days before the letter was sent, and that this creates a genuine issue of material fact. We disagree, concluding that the District Court was correct to award judgment on the breach of contract claim based on the Vice President's affidavit about the amounts Paramount owed. This is true regardless of what the November 14 letter said, because if it was an accord it was never satisfied and thus Paramount was responsible for the initial obligation.

D. *The Setoff*

Paramount asserted a setoff based on the same facts that grounded its initial claim, i.e., Paramount alleged that the 1989 crash was caused by Agusta's defective manufacturing and maintenance, and that the crash caused Paramount significant harm. Paramount argued that the helicopter that was the subject of the counterclaim also had a vibration problem like the problem that caused the crash, although the District Court found the maintenance records difficult to decipher on that point. Thus, Paramount contends that it is entitled to recover from the Agusta defendants for the harm caused by the crash-related events, which offsets any amount it might owe AAC. The District Court rejected the setoff claim on entire controversy grounds. Because we have found the entire controversy doctrine inapplicable to Paramount's claims, Paramount will be entitled to try to prove its case on remand and, if it prevails, it may offset any recovery against the amount owed on the counterclaims. In sum, we uphold the District Court's determination of the amount due on the counterclaims. However, because the setoff may be a valid claim, we will vacate the judgment on the counterclaims pending resolution of Paramount's claims on remand.

IV. Conclusion

For the foregoing reasons, we will reverse the District Court's grant of summary judgment to the Agusta defendants on Paramount's tort claims and remand for further proceedings. We will affirm the District Court's determination of the amount owed on AAC's counterclaims, but vacate the judgment on the counterclaims pending disposition of Paramount's tort claims.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6257

PARAMOUNT AVIATION CORPORATION
Appellant

v.

GRUPPO AGUSTA; AGUSTA AEROSPACE CORPORATION; COSTRUZIONI AERONAUTICHE GIOVANNI, Agusta, S.p.A. AGUSTA, S.p.A

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 91-cv-04954)
District Judge: Honorable John W. Bissell

Present: Becker, Chief Judge, Lewis and Wellford, *
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 25, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

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*Honorable Harry Wellford, United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Court entered July 23, 1998 granting summary judgment to the Agusta defendants on Paramount's tort claims, be, and the same is hereby reversed and the cause is remanded to the District Court for further proceedings. The District Court's determination of the amount owed on AAC's counterclaims is affirmed but the judgment on the counterclaims is vacated pending disposition of Paramount's tort claims. All of the above in accordance with the opinion of this Court.

Attest

P. Douglas Silo

Clerk

Dated: May 13, 1999

Certified as a true copy and issued in lieu
of a formal mandate on June 4, 1999

Teste: P. Douglas Silo

Clerk, United States Court of Appeals for the Third Circuit